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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
MAY TERM, A. D. 1941.

3131A. 177

ABINGDON BANK & TRUST COMPANY,  
of Abingdon, -Illinois, a Banking Cor-  
poration,

Plaintiff-Appellee,

vs.

H. C. EULKELEY, R. Y. CAMPBELL,  
C. D. BYRAM, ORION LATIMER,  
T. E. BURNSIDE and W. G. DUNLAP,  
Defendants, Appellants. )

Appeal from  
Circuit Court,  
Knox County.

WOLFE,-- P. J.

The Abingdon Bank & Trust Company of Abingdon, Illinois, a banking corporation, brought a suit in the Circuit Court of Knox County, against the defendants on nine promissory notes. The complaint consists of one count and alleges that on March 29, 1929, each of the six defendants together with one, B. P. Baird, G. A. Shipplett and E. U. Shumaker made their several promissory notes to the amount of \$2,580.18 and each endorsed the notes respectively and delivered the same to the

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First State and Savings Bank of Abingdon, Illinois, the payee in said notes. The notes were made payable six months after date, and it is alleged that they were made and delivered to the payee for a good and valuable consideration.

It is next alleged that said notes were, thereafter for a good and valuable consideration, endorsed by said First State and Savings Bank, and delivered to the plaintiff, which it is alleged, is now the owner and holder of said notes. It is further alleged that the sum of \$1,634.97 is now due on each of said notes as principal together with interest at the rate of 5% per annum, and that in and by said notes all the makers and endorsers expressly agree to pay all costs and a reasonable attorney's fee, if said notes are not paid at maturity. It is further charged that B. P. Baird, G. A. Shipplett and E. U. Shumaker have died and claims have been filed by the plaintiff against the estate of each. The estates are being administered in the County Court of Knox County, Illinois, but no payments on account of said indebtedness have yet been received. It is also alleged that the estate of G. A. Shipplett is insolvent. The plaintiff alleges that there is due to it, the sum of \$23,219.84 on said notes as principal and interest accruing thereon, to and including April 7, 1939, and a further sum of \$2,500.00 for a reasonable attorney fee for the collection of the notes.

The only defendants who filed an answer were H. C. Bulkeley and C. D. Byram. They admit the making and endorsing the notes in

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question. They deny that said notes were made and delivered to the First State and Savings Bank of Abingdon for a good and valuable consideration. They deny said notes were endorsed by First State and Savings Bank and delivered to the plaintiff for a good and valuable consideration. They deny that there is anything due on said notes and deny that the plaintiff is entitled to attorney's fees for the collection of the same.

In the defendants' answer, they set forth numerous defenses of which several were stricken by the court on motion of the plaintiff. The fourth defense of the defendants is, that prior to the signing and execution of the notes declared upon in the complaint, on August 29, 1927, articles of agreement were entered into between the First State and Savings Bank and the First National Bank of Abingdon, which were referred to as Exhibit A, and attached to the defendants' answer. That said agreement marked Exhibit "A" among other things provided for the execution by the nine directors of First National Bank of Abingdon, including defendants, H. C. Bulkeley and C. D. Byram, of promissory notes totaling \$56,156.00, and provided further that the First National Bank of Abingdon would place as collateral security to the notes of the nine directors totaling \$56,156.00, the corporate note of First National Bank of Abingdon in the sum of \$75,000.00, and the equities of the First National Bank of Abingdon, represented by shares of stock of the Bank of St. Augustine, out of which corporate note and equities, the promissory

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notes of the directors plus accrued interest were to be liquidated.

That pursuant to and in accordance with the provisions of said contract and in part performance thereof, the nine directors of the First National Bank of Abingdon, including defendants, H. C. Bulkeley and C. D. Byram, made and executed their promissory notes and endorsed the notes of each other in the total amount of \$56,150.00, and the First National Bank of Abingdon made and executed as collateral security to the promissory notes of said directors its corporate note in the sum of \$75,000.00 and delivered the same to the First State and Savings Bank and First National Bank of Abingdon as collateral security to the promissory notes of said directors, and assigned its equities represented by shares of stock of the Bank of St. Augustine to First State and Savings Bank;

That on November 5, 1927, said corporate note of the First National Bank of Abingdon was reduced to judgment in the amount of \$76,883.37; that on information and belief the First State and Savings Bank and plaintiff have received on account of said judgment claim the sum of \$65,783.36 from the Comptroller of Currency of the United States by virtue of collections made by said Comptroller of stockholders' assessments of First National Bank of Abingdon; that the First State and Savings Bank and plaintiff have received in cash from the equities represented by shares of stock of the Bank of St. Augustine the sum of \$16,006.79, and have received divers other sums in payment of the

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corporate note of First National Bank of Abingdon and the equities represented by the shares of stock of the Bank of St. Augustine, the amount of which is unknown to defendants, H. C. Bulkeley and C. D. Byram; that in addition to said sums there are now certain sums available to plaintiff from the equities represented by shares of stock of the Bank of St. Augustine, the amount of which is unknown to the defendants, H. C. Bulkeley and C. D. Byram.

That the notes declared upon in the Complaint are notes given and endorsed in renewal of the nine promissory notes of the directors of First National Bank of Abingdon heretofore referred to and are subject to the terms and provisions of the contract attached and marked as Exhibit "A"; that accordingly the sums referred to as having been received by First State and Savings Bank and plaintiff are sums which should have been applied by said parties to liquidate the promissory notes of the nine directors and the renewal notes sued upon of said directors, including the defendants, H. C. Bulkeley and C. D. Byram; that if said sums had been applied as required by said agreement and by law, the said original promissory notes of the defendants, including defendants, H. C. Bulkeley and C. D. Byram, and the renewal notes of said defendants sued on therein would be fully paid and satisfied.

That said notes declared upon in the Complaint were assigned to plaintiff after the same became due and upon information and belief that plaintiff received said notes with notice of the agreement marked Exhibit "A"; that said sums so collected and delivered to First State and

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Savings Bank and to plaintiff, together with the sums available to plaintiff, by virtue of the assignment of the stock of the Bank of St. Augustine, are sums held in trust by said parties to be applied to the liquidation of the promissory notes of the defendants and including the notes of the defendants herein sued upon; that such sums are in excess of the principal and interest of said original promissory notes and said renewal notes herein sued on, that the plaintiff is not a holder in due course of the notes sued on and the original promissory notes of the nine directors plus interest referred to in contract marked Exhibit "A", and the notes herein sued on together with interest have been fully paid.

The ninth defense was that there was no consideration for the notes declared upon in the complaint, and that the defendants were not indebted to the First State and Savings Bank of Abingdon at the time of the execution and delivery of said notes, upon any consideration whatever, and that said promises of said defendants were mere naked promises without any consideration therefor; that said notes declared upon in the complaint were assigned to the plaintiff after the same became due and payable according to the terms thereof; and that they were executed without consideration, and consequently, are without consideration in the hands of the plaintiff.

To the answer of the defendants, the plaintiff filed its reply in which it admitted all of the allegations except that it denies that the collections received from the Comptroller of the Currency are in the amount stated by the defendants and denies that the sums collected

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by the First State and Savings Bank and plaintiff are in excess of the principal and interest on said original promissory notes, and the renewal and interest sued on. It denies the charge of the defendants that it is not a holder in due course of the notes sued upon, and the original promissory notes that were delivered by the nine directors referred to in the contract marked Exhibit "A," and that said promissory notes sued on together with interest, have been fully paid. It alleges that all sums received by the First State and Savings Bank and the plaintiff, have been applied, to liquidate the promissory notes of the nine directors and the renewal notes of said directors including the defendants Bulkeley and Byram, and that said sums have been applied as required by Exhibit "A" and the law.

The case was tried before the Court without a jury who found the issues in favor of the plaintiff, and entered judgment for it in the sum of \$25,718.69. It is from this judgment that the appeal is prosecuted to this Court.

The evidence shows that on August 29, 1927, an agreement was entered into between the First State and Savings Bank of Abingdon, and the First National Bank of Abingdon which provided for the assumption by the First State and Savings Bank of all of the liabilities of the First National Bank, and the transfer of all of the assets of the First National Bank to the First State and Savings Bank. The agreement stated that the estimated value of the assets of the First National Bank was \$56,156.00

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less than the estimated liabilities of said bank and that nine promissory notes of the directors of the First National Bank including Bulkeley and Byram, were executed and endorsed by all of such directors in the total sum of \$56,156.00 and delivered to the First State and Savings Bank in accordance with the provisions of said contract. The agreement further provided that the First National Bank would place as collateral security for the notes of the nine directors the corporate note of the First National Bank in the sum of \$75,000.00, and the equities of the First National Bank, represented by shares of stock of the bank of St. Augustine, out of which corporate note and equities the promissory notes of the directors including the defendants-appellants were to be liquidated; that in pursuance of such agreement, the said directors executed their notes and endorsed each others, and the First National Bank executed its corporate note for \$75,000.00 as collateral security to the directors' notes which notes together with the equities in the stock of the Bank of St. Augustine were delivered to the First State and Savings Bank.

On November 5, 1927, the corporate note of the First National Bank was by the First State and Savings Bank reduced to judgment in the amount of \$77,135.97. A receiver was appointed for the First National Bank. Proof of the judgment was filed as a claim with the Comptroller of Currency. Three dividends from the First National Bank were paid by the Comptroller of the Currency to the First State and Savings Bank in the total amount of \$64,223.37. These payments were made on March 8, 1928, in the sum of \$13,000.00. On November 12, 1928, the sum of

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\$36,850.00 and on January 29, 1929, the sum of \$12,439.79. The first renewal note was executed and delivered on August 29, 1928, and the note sued upon on March 29, 1929. All of said notes (including the contract which is referred to as defendants' Exhibit "A") were, for a valuable consideration, delivered to the plaintiff on February 1, 1930. In addition to the \$64,223.37 which the First State and Savings Bank collected from the Comptroller of the Currency, it has collected on the collateral an amount of approximately \$23,000.00 or more.

The Abingdon Bank & Trust Company was organized in January 1930, and since that time the defendant, Bulkeley, has been a director of said bank, and has attended numerous directors' meetings and signed reports which contained a statement that these notes were held as part of the assets of the bank. It is agreed that Mr. Bulkeley told the bank examiners that he expected renewal notes to take up the old notes which were long past due. This conversation took place in 1937. Later however, when the examiners inquired of Mr. Bulkeley why the notes had not been taken care of, Bulkeley informed the examiners that the renewal notes represented fictitious bookkeeping entries and that no arrangements would be made to renew the notes except by order of Court. There is no evidence in the record that shows that either Bulkeley or Byram ever had any knowledge of the payments made by the Comptroller of the Currency to the First State and Savings Bank of Abingdon.

It is first insisted that the notes in question were taken by the plaintiff bank after they became due, and therefore any defense

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that the makers of the note may have had against the original payee of the note, is available to them as a defense in this action. This proposition of law is not disputed by the appellee and is fully sustained by our Courts.

It is next insisted that there is no consideration for the notes in question, as they are renewal notes that were given by the directors to the First State and Savings Bank of Abingdon, Illinois, and at the time the original notes were executed, they were given as collateral security as set forth in Exhibit "A" and made a part of the agreement entered into between the two banks at the time the notes were given; that according to the terms of said agreement, the receiver of the closed bank, by order of the Comptroller of the Currency, paid to the First State and Savings Bank of Abingdon, together with other collections, an amount in excess of what was due on said notes before the notes now sued on were executed, and therefore there was no debt due from the signers and endorsers of the notes to the payee therein.

The whole defense rests upon the construction that the Court places on defendants' Exhibit 1, which is Exhibit "A" of the contract, the pertinent parts of which are as follows: "DIRECTORS GUARANTEE FUND in the total amount of Fifty-six Thousand One Hundred Fifty Six and no/100 Dollars as evidenced by Exhibit 'H' which is hereto attached and made a part of this contract; and it is hereby agreed by the Parties hereto that the Party of the Second Part will place with the Party of

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the First Part as collateral security to the notes listed in 'Exhibit H' the corporate note of the Party of the Second Part in the principal sum of Seventy Five Thousand and No/100 Dollars said note to be executed and delivered with this Agreement; and as further collateral security to the notes listed in Exhibit 'H' Party of the Second part hereby pledges the equities represented by the shares of stock of the Bank of St. Augustine as listed in Exhibit 'I' which is hereto attached and made a part of this contract; and it is further agreed by the Parties hereto that after the notes plus accrued interest listed in Exhibit 'H' have been liquidated from the proceeds of the corporate note of Seventy Five Thousand Dollars hereinabove mentioned together with the proceeds from the bank stock listed in Exhibit 'I' that any remaining surplus shall be transferred into the 'General Guarantee Fund' hereinafter mentioned and applied as hereinafter provided."

It is the contention of the appellee that giving this part of the agreement the usual and ordinary meaning would be that the notes signed by the defendants were a guarantee that the assets of the First National Bank of Abingdon which were turned over to the First State and Savings Bank, would be sufficient to pay the liabilities assumed by the First State and Savings Bank, and if they were not sufficient, that then the notes of the banking corporation and the defendants should be used for the purpose of liquidating the liability of the bank. It is the contention of the appellants that according to the contract in question, the corporate note of \$75,000.00 was executed as collateral

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security for the notes of the nine directors, and that if the \$75,000.00 note was paid, that this should be used to liquidate the notes of the directors.

It is undisputed that between the time the first note was executed, namely, August 27, 1927, and the second renewal note executed March 29, 1929, the First State and Savings Bank had collected dividends paid by the receiver of the defunct First National Bank of Abingdon in the amount of \$64,223.37. The record shows that in addition to the amounts collected on the judgment, that the First State and Savings Bank has collected \$16,000.79 from the equities represented by the shares of stock of the Bank of St. Augustine, which had been assigned to it by the First National Bank of Abingdon.

It seems that both sides charge that the other party to this litigation could have produced facts in evidence that might have had some bearing upon the issues in this case which they failed to do. It is insisted that since Dulkeley was a director of the appellee bank and had knowledge that these notes were being carried as assets of the bank, that such knowledge should somehow affect the merits of the controversy. There is no evidence that Dulkeley or Byrum had any knowledge that the First State and Savings Bank had collected anything whatsoever which should be applied on their notes.

In their brief, the appellee says, "The execution and delivery of the notes in suit are the very best evidence the defendants could have given of a deficiency for which they were liable. They are business men

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of considerable wealth and standing, as is shown by the statement of their financial condition in the various examiner's reports in connection with these notes. It is difficult to conceive that men of maturity would obligate themselves to this extent. Not only as makers of their own notes, but as endorsers of notes eight times the amount of their own, if they weren't liable and obligated to pay a deficiency which in fact existed." It is also difficult to understand why a banking concern would carry past due notes for nearly ten years without an effort being made to collect them if the makers were men of considerable wealth and standing in that community. Especially is this so when the bank examiner repeatedly kept calling the officer's attention to this past due paper, and requested the bank to take care of it.

It is our conclusion that the evidence shows that at the time the notes in question were executed that the First State and Savings Bank had collected more than sufficient money to pay the amount of the bank note of \$75,000.00; that the contract of guarantee was a limited one and only guaranteed the collection of the \$75,000.00 note; that the evidence shows that this amount had been collected with some surplus, and therefore at the time the notes in question were executed, there was nothing due and owing from the defendants to the First State and Savings Bank; that there was no consideration for the notes, and at the time they were executed neither Bulkeley nor Byram had any knowledge of the collections made by the First State and Savings Bank on the judgment of \$75,000.00 taken on the bank's note.

It is our opinion that the Trial Court erred in rendering judgment in favor of the plaintiff, and the judgment of the Trial Court is hereby reversed.

Judgment Reversed.

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1. *Journal of the American Medical Association*, 1990; 263: 1025-1028.

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4. *Chlorophyll a* and *Chlorophyll b* contents were determined by spectrophotometry using the method of Lichtenthaler and Whistler (1987).

July 1, 1941  
Rec'd with Jk. nls  
when case was  
reheard 12-17-41

Be it Remembered, That, to-wit: On the 18th day of December, A.D. 1941, certain proceedings were had and orders made and entered of record by said Court, among which is the following, viz:

Abingdon State Bank & Trust Company  
of Abingdon, Illinois, a banking  
corporation,

9676 vs.  
H. C. Pulkeley, et al.,

Appellee

Appeal from the Circuit  
Court of Knox County

Appellants

Now on this day this cause coming on for hearing upon the petition for a rehearing filed herein, and the Court having duly considered said petition, as well as the matters and things alleged in support thereof, and being now fully advised in the premises;

It is therefore ordered by the Court that said petition for a rehearing herein, be and the same is hereby overruled and denied and that said petitioner pay the costs and charges herein taxed.

And it is further ordered by the Court that the opinion of this Court heretofore filed, on, to-wit: August 7, 1941, be and the same is hereby modified to read that the judgment of the Circuit Court of Knox County be reversed and this cause remanded for another trial.

And it is further ordered by the Court that all pending motions herein, be not considered.



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 IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, 1941.

49a

CHRISTINE DOELLEFIELD,

APPELLEE,

vs.

TRAVELERS INSURANCE COMPANY,  
a Corporation,

APPELLANT.

313 I.A. 177<sup>2</sup>

: APPEAL FROM THE CIRCUIT

COURT OF WINNEBAGO COUNTY.

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 HUFFMAN, J.

Eyner C. Peterson had a policy of life insurance in appellant company, in which his wife, Christine Peterson, (now Christine Doellefield, appellee,) was named as beneficiary. An additional indemnity provision was attached to the policy, which provided for the payment of an additional sum in case of accidental death.

The insured lost his life by drowning on Nov. 3, 1932. Appellant acknowledged liability under the life provision of the policy, and made settlement thereof. It denied liability under the additional indemnity provision, on the ground that the same was not in force at the time of the insured's death for the reason that the premium provided for therein had not been paid.

Upon suit by appellee to recover under this provision, the jury returned a verdict in her favor. Appellant brings





this appeal from the judgment rendered thereon.

This case was previously before this court, and is reported in 303 Ill. App. 123, Doellefield v. Travelers Ins. Co. and G. A. Brodine, wherein verdict was for the defendants. Following the first trial, suit was dismissed as to Brodine, and additional counts filed.

Appellee, by such additional counts, charges that Brodine was the general agent of appellant, possessed with authority to solicit insurance, receive applications therefor, forward same to the company, receive and deliver policies, and to collect premiums thereon for and on behalf of appellant. It is further charged that Brodine and appellant over a period of years, had maintained a system of accounts which was reflected upon the books of appellant, wherein items for premiums upon policies of insurance sold by Brodine were charged by said company against his account, and that under this arrangement, appellant had treated the charges of such items against Brodine's account as a payment of the premiums due to it upon the policies included in such transactions; and that Peterson was one of the policyholders whose account was thus handled as between appellant and its agent, Brodine. Appellee insists that appellant, by its pleadings, admitted the above charges. However, it appears that the answer to the additional counts denies such averments and allegations.

The evidence is not extensive, nor the witnesses numerous. Appellee was the sole witness in her behalf. Brodine and his bookkeeper were the only witnesses for the defendant.

The position of appellant is, that the monthly premium on the additional indemnity provision, which fell due on Sept. 26, 1932, was not paid, and the same thereby lapsed. Appellee insists that by virtue of an agreement between her husband and



Brodine, which was acceptable to appellant, and according to an established custom, Brodine agreed to charge such premium on his books, and that the same should be treated as payment thereof.

Appellee testifies that her husband was engaged as a salesman; that sometime in the month of September, 1932, she went with him to the office of Brodine, pursuant to a telephone call from Mr. Brodine; that Brodine wanted to talk to her husband about his account; that while present in his office, she heard a conversation between them, in which Brodine stated the amount of money her husband then owed him, and suggested that he secure a loan on his policy in order to take care of same; that pursuant to such conference, her husband procured a loan on his policy, which was something near \$200, and paid same to Mr. Brodine to apply upon his account; and that a balance remained due of slightly over \$91. She further testifies that her husband told Mr. Brodine they were contemplating this trip. She claims that the premium due upon the additional indemnity provision for the month of September, 1932, was included in the balance of \$91, then owing to Mr. Brodine; that she told him their salary had been reduced and she thought they were carrying too much insurance; whereupon he suggested that considering they had two children, he did not think so. Shortly after this visit to Brodine's office, the family left for a trip to the Lake of the Woods in Canada. While on this trip, a boat in which the parties were riding capsized, and Mr. Peterson, the two children, and the guide were drowned. Appellee states that she had been in Brodine's office many times with her husband when business would be transacted; that her husband paid money to Brodine whenever he could, and that if he was unable to pay the premiums, when due, he would give his note to Brodine; that Brodine kept up her husband's



premiums, and sometimes her husband made payments on such notes at the bank. She says she returned with her husband to Brodine's office about Oct. 1, 1932, which was when the draft for the loan on his policy had arrived; that Mr. Brodine's bookkeeper then gave them a statement of their account showing the balance remaining due from her husband to Brodine. She denies that at this time, Brodine said to her husband the banks were closing and he could not carry his account any longer, but she insists that he promised them he would keep their policy in force.

It appears from the testimony of Brodine's bookkeeper, who had worked in his office for eighteen years, that he had advanced premiums on behalf of Mr. Peterson to appellant company; that he frequently took notes from Peterson to himself for money so advanced; and that these notes would be discounted at the bank. This witness further testifies that the custom of the office with respect to policies upon which the premium was payable monthly, was to collect such premiums each month, unless Mr. Brodine had an agreement with such policyholder that, in the event the policyholder did not make his remittance promptly, that Mr. Brodine would advance the premium for such policyholder. She states that they had probably ten or twenty such policyholders. She says that under an agreement between Mr. Brodine and Mr. Peterson, that Mr. Brodine paid for Mr. Peterson his premium due on July 26, 1932; that when the August premium became due, and during the grace period, Mr. Peterson came to the office and took steps to secure the loan on his policy; that since the policy was then in the grace period, the August premium was deducted from the loan then being secured; and that the premium which became due Sept. 26, 1932, was not paid. She further



states that when Mr. Peterson came to Brodine's office about Oct. 1, 1932, to receive the draft for the loan on his policy, that he was alone; that Mrs. Peterson was not with him; that Mr. Peterson and Brodine then had a conversation; that Mr. Peterson endorsed the draft and turned it over to this witness to apply as a credit upon money which he owed Mr. Brodine. She says these two gentlemen had a talk about the remaining balance due from Peterson to Brodine, and that he told Peterson he could not continue to make any further premium payments for him, to which Mr. Peterson replied that he did not expect him to make any more payments for him. She states that she, at that time, advised Mr. Peterson his grace period on the policy in question would expire on October 26th.

Mr. Brodine testified that when Mr. Peterson came to his office on or about Oct. 1, 1932, he talked with him about his payment of premiums on this policy; that at this time, he gave Mr. Peterson a draft representing the loan which he had secured on his policy; that Peterson accepted the draft and endorsed it. Brodine says that he advised Mr. Peterson, at this time, that due to the banking situation, he would have to discontinue paying any further premiums for him; that his bank had closed; and he didn't have the money to pay any more premiums; and that in the future, it would be necessary for Peterson to pay the premiums on his policy as they became due, to which, he says, Mr. Peterson replied, that he did not blame him, and that he wouldn't do it either. He says Peterson advised him he was going on a fishing trip for two or three weeks, and that he would not return until after November 1st; and that he then said to Peterson his premium on this policy would in the meantime lapse, to which Peterson replied: "I can't help it. I am just going out and have some fun. I have been hounded by





banks and everybody, and now my wife wants nice things, and if I pay you this premium, I can't go on that vacation and enjoy it like I want to." The witness states that Mrs. Peterson was not present at this time. It appears from the evidence of this witness that he had been acquainted with Peterson for a number of years, and at one time, made him a loan of \$100. He says Mrs. Peterson had been to his office with her husband at various times, but that she was not there upon the occasion in the early part of October, 1932; that the last time he saw her in his office with her husband was in the early part of September, when his account was discussed, and application made for the loan on his policy.

Appellee insists upon the rule as announced in *Niemann v. Security Benefit Ass'n.*, 350 Ill. 308, 316, that a general agent clothed with authority to solicit insurance, take applications therefor, forward same to the company, deliver policies and collect premiums, has power to waive a condition of the policy notwithstanding a prohibition of such power by the terms thereof. Ordinarily, an insurance company is regarded as having the power to extend credit for premiums. From this, it follows that the authorized agents of such companies have similar powers, since the company, if an incorporation, can only act through individuals, and where credit is extended by a general agent, it is effectual, unless he be restricted in such regard and the insured have notice thereof. The insurer's agent in the course of business, may pay the premium to the company for the insured, in which case, the premium is considered paid as between the insured and the insurer. 3 Couch, sec. 604, p. 1954 et seq.

Since a strict performance of a provision in the policy for payment of premium is for the benefit of the insurer, it



therefore may refrain from insisting upon a strict compliance with such provision, and extend time for payment. As previously stated, it is generally considered that a general agent may extend time for payment of premiums, or the same may arise as a result of a custom or course of dealing on the part of the company, or its authorized agent. 3 Couch, sec. 633, p. 2028 et seq.

It has been said that as between the company and its agent, although such agent be forbidden to take a note for premium, the taking of a note therefor will constitute payment, where the custom or common practice between the agent and his company is for the agent to take a note in his own name, and charge it in his account with the company, holding himself responsible for its collection. And where the agent takes the note to himself and advances the money therefor to the company, payment of the premium is thereby considered sufficient. 3 Couch, sec. 654, at p. 2121.

An agent empowered to take insurance, deliver policies, collect premiums, sign policies in his own name, may bind the company by a waiver of conditions. 2 Couch, sec. 530 b, at p. 1604; 29 Am. Jur. sec. 825 - General Agents. It will be observed that the author in this section states that in many jurisdictions the power to effect a waiver of a condition in a policy, as applied to general agents, means such agents as have the power and authority to make contracts without reference to the home office, and thus is restricted to such agents as are authorized and empowered to issue, sign and deliver policies, while mere local or soliciting agents, who are only authorized to solicit insurance, take applications therefor, deliver policies after they have been issued and signed by the proper officers, receive and remit premiums therefor, have no



authority to waive conditions or forfeitures arising from a breach of the policy's provisions. 2 Couch, sec. 530 b, p. 1602 et seq; 29 Am. Jur. sec. 826 - Soliciting Agents.

We find no evidence tending to prove appellee's claim that appellant maintained a system of accounts with its agent, Brodine, which reflected premiums advanced by him on Peterson's policy, or on other policies, upon which he might have advanced premiums for the insured. The only evidence in the case upon this point, proves that all premiums upon Peterson's policy, paid by Brodine, were paid by a cash remittance to appellant. There would be nothing in connection with a cash remittance to put appellant upon notice that its agent was advancing money from his private funds on behalf of Peterson to pay the premiums on his policy. Nor do we find any evidence tending to prove that appellant maintained a system of accounts with its agent Brodine, wherein said agent's credit or account with appellant would be charged with the amount of premium on Peterson's policy, in lieu of the receipt of cash therefor. Therefore, appellant is not to be charged with an established custom which could be said to produce an estoppel as claimed. Further, the evidence discloses that such notes as Brodine took from Peterson from time to time, were taken by him individually, and by him discounted at his local bank in Rockford. The mere voluntary payment of premiums on Peterson's policy by Brodine did not create any legal obligation on his part to continue payment of such premiums beyond such time as he chose so to do. Peterson recognized this fact, as the evidence shows that on his visit to Brodine's office about October 1st, upon being advised by Brodine he would make no further payments for him, replied that he did not blame him, and that if he was in Brodine's place, he wouldn't make them either. Thus, we find that the course of conduct between Brodine



and Peterson with respect to the former paying premiums on the latter's policy, not only failed to create a situation at law where Brodine became legally obligated to keep up such premiums, but we further find from the statement of Peterson, that he did not expect Brodine to any longer continue paying them.

Under the evidence, we do not find involved in this case, the question of the waiver of a condition of the policy by appellant. If the custom that had existed between Brodine and Peterson be considered as personal between them, it could not be said to create a legal obligation on the part of Brodine to continue such custom indefinitely, and it must be said that he had the right to discontinue the same. If the act of Brodine in paying premiums for Peterson on his policy, be considered the act of appellant, and amounting to a waiver of the condition of the policy with respect to payment of premiums, there is nothing to have prevented a refusal by appellant at any time to so continue such custom. The evidence shows that Brodine advised Peterson before he started on his trip to Canada that no more premiums would be advanced for him. This notice was given to the insured at a time which afforded him ample and sufficient opportunity to pay the premiums himself, and thus save himself from harm because of such change in the custom theretofore existing. It must be conceded that if Brodine, as agent of appellant, had the power and authority to originate such custom and thereby create a liability on the part of appellant, that he likewise had the power to give notice to the insured of the discontinuance of such custom in the future, and if such notice was given at a time which afforded the insured ample opportunity to save himself from harm because of such change in custom of dealing, then estoppel cannot be said to exist.

The circumstances surrounding the meetings between the





parties in September and October indicate an attempt on the part of Brodine to get his account settled with Peterson. This is evidenced by the fact that as a result of the September meeting, the insured secured what cash loan he could on his policy and turned it over to Brodine to apply upon his indebtedness to him for advances he had made to pay premiums. This amount failed to discharge the insured's debt to Brodine. The bank at which Brodine did business had closed, the evidence shows that he told Peterson he was no longer in a financial condition to continue keeping up the premiums for him. The evidence further shows that he advised Peterson the policy in question would lapse before his return from Canada, to which Peterson replied that he could not help it. Thus, we find that the insured was no longer relying upon the custom previously existing with respect to the non-payment of premiums. The above situation eliminates the question of waiver of payment of premiums, or waiver of condition of the policy providing for its forfeiture in case of non-payment of premiums, and repels the application of the rule regarding those questions, sought to be applied by appellee.

Appellant assigns the giving of plaintiff's instruction No. 4 for error. The instruction reads as follows:

"The Court instructs the jury, if you believe from a preponderance of the evidence, that on or about October 1, 1932, G. A. Brodine had a conversation with Eyner C. Peterson and Christine Peterson, his wife, wherein it was stated to said Brodine that said Eyner C. Peterson and his wife were about to leave on a trip into the North Woods and would be gone for several weeks and then said Eyner C. Peterson and Christine Peterson, or either of them, then and there requested said Brodine to pay the insurance premiums on the policy in suit in this case, while they were gone and keep the policy in good standing, so far as payment of premiums was concerned, and stated to said Brodine that they would repay him for the money he paid out on account of said premiums while they were gone, and that said Brodine then and there stated in substance

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to said Eyner C. Peterson and his wife that he, the said Brodine, would pay the said premiums on the policy in suit for said Eyner C. Peterson while he was away and that he would keep said policy in force so far as payment of premiums was concerned while said Eyner C. Peterson was on said trip, and that said Eyner C. Peterson and Christine Peterson relied upon said arrangement, then you are instructed that the rights of the parties in this suit are to be decided the same as if the premium due September 26, 1932, had been paid to the Travelers Insurance Company, and the failure on the part of said Eyner C. Peterson to pay said premium in question is not a defense to this suit."

This instruction illustrates the theory upon which plaintiff tried her case. It assumes that Brodine falls within the rule of a general agent of appellant. That was a matter in dispute. It does not submit to the jury the question of such agency. This is a very close case and the jury should be carefully instructed.

We are of the opinion that the evidence does not sustain the verdict. The judgment is therefore reversed, and the cause remanded for a new trial.

Reversed and remanded.

[illegible]

JOHN ZACHOTINA, EDWARD KLOWS,  
CHARLES CADA, HENRY PIKAS,  
ERIC ANDERSON, STANLEY JAMES,  
JAMES VESELY, LOUIS KIZAS,  
FRANK KOPECKY, FRANK PAUL,  
GEORGE WOKAS and THE PEOPLE OF  
THE STATE OF ILLINOIS ex rel.  
the plaintiffs aforesaid,  
(Plaintiffs) Appellants,

v.

THE TOWN OF CICERO, a Municipal  
Corporation, et al.,  
Defendants.

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

312 I.A. 178

MAYNARD R. FAUBLE et al.,  
(Defendants) Appellees.

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

John Zachotina et al., residents and taxpayers of the Town of Cicero in Cook county, Illinois, on July 14, 1939, filed their complaint against The Town of Cicero, a municipal corporation; Joseph Cerny; Anton F. Maciejewski; Jerry J. Viterna; Nicholas Hendrickse; Rose Cuchna; Fred Loyda; James Sedlacek; Frank A. Kveton; Henry R. Schwarzel; Frank Novak; Rudolph J. Hurt; Gustav O. Randa; Joseph Danek; George Stedronsky; Rudolph Krejci; Felix Zdrojewski; The Public Service Company of Northern Illinois, a corporation; Maynard Fauble; Seipp, Princell & Co., a corporation; Michael J. Bransfield & Sons, a corporation; Edward J. Schmidt; Charles H. Lithgow; F. J. Carroll; Illinois Bell Telephone Company, a corporation; Carl A. Miller; Mose Levy; Charles H. Albers as Receiver of the Pinkert State Bank and Peoples Bank and Trust Company, both banking corporations; Fidelity and Casualty Company of New York, a corporation; and Great American Indemnity Company of New York, a corporation. From orders sustaining motions of certain defendants in the nature of demurrers to dismiss the complaint as to them and dismissing the complaint as to them, plaintiffs appeal.

The complaint alleges that the individual plaintiffs



have been ever since 1932 residents and taxpayers of the Town of Cicero, Cook County, Illinois; that the defendant Town of Cicero is a municipal corporation; that certain individual defendants (naming them) are and have been acting officers and trustees of said Town since (reciting respective names, offices and terms, first Tuesday in April, 1932, to date); that certain other defendants (the appellees, other than Seipp, Princill & Co.) are named as judgment creditors of said Town in a purported ordinance of said Town made a part of the complaint as Exhibit A. The complaint then contains allegations as to the official bonds of the various town officers and then recites that the statute in question (town charter) is made a part of the complaint as Exhibit B, and that the appropriation ordinances passed and adopted by the President and Board of Trustees of said Town in each year of or after 1932 are as set forth in copies thereof made a part of the complaint as Exhibits C, D, E, F, G, H, J and K; that notwithstanding the statute, Pars. 5 to 10, both incl., Ch. 102, Ill. R.S. 1937, the only statement filed by any officer of said Town during or after 1932, in the office of the County Clerk, or published, is the same as Exhibit L, made a part of said complaint; that said officers and trustees wrongfully and unlawfully conspiring and confederating together and with others whose names are to plaintiffs unknown, but whom plaintiffs desire to make parties defendant when discovered, to cheat and defraud said Town and to convert its money, funds and securities to their own use and to divert the same from the purposes to which they should have been applied, have heretofore from time to time from first Tuesday in April, 1932, to present, entered into various fictitious, illegal and void contracts with divers persons and corporations to plaintiffs unknown; have paid divers sums of money out of money and funds of said Town without any actual consideration; have paid out divers funds and moneys of said Town for lawful payment of which





a previous appropriation ordinance was required, without making or having any appropriation made therefor; have collusively permitted judgment to be taken against said Town for some of the money for which said Town was not lawfully indebted; the various particulars of all of which, except as hereinafter set forth, are unknown to plaintiffs, but ought to be disclosed by defendants; that the complaint upon which said judgment in favor of Maynard Fauble was entered purports to claim wages and salaries alleged to have been earned and to have remained unpaid for services performed by various persons as employees of said Town, and to have been assigned to Maynard Fauble, but plaintiffs are informed and believe, and upon such information and belief charge, that in some instances there was no previous appropriation for services of said assignors, in other instances some of said assignors performed no work or services, and in other instances said supposed assignors were merely fictitious names of non-existent persons, and so it would appear if defendants would make full and complete discovery with respect thereto; that although some of the assignments included in said judgment represent valid claims against said Town, yet the claims that are fraudulent or fictitious ought to be ascertained, and as to those said Fauble ought to be enjoined from enforcing such portions of said judgment as represents them, and said officers of said Town ought to be enjoined from paying same; that when said Supervisor took office he received from his predecessor, belonging to said Town, approximately \$264,612 in net accounts receivable and approximately \$70,000 in cash; that in addition there was paid to said Town Collector on or before the following dates taxes on real and personal property as follows: June 1, 1932, taxes for 1930, \$318,519.47; Apr. 8, 1933, taxes for 1931, \$263,567.09; Apr. 15, 1934, taxes for 1932, \$295,969.54; Jan. 1, 1935, taxes for 1933, \$230,562.53; Nov. 1, 1935, taxes for 1934, \$260,679.46; Sept. 1, 1936, taxes for 1935, \$326,216.55; Aug. 1,

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1937, taxes for 1936, \$341,685.12; June 1, 1938, taxes for 1937, \$397,233.02; June 1, 1939, taxes for 1938, \$432,711.76; total, \$2,867,216.54; that in addition said Collector in office from time to time received from first Tuesday in April, 1932, to present, other money, the amount of which is unknown to plaintiffs and they have been unable upon diligent search and inquiry to ascertain same, for permits, licenses, vehicles taxes, payments by water consumers, sealer's fees, fines and inspection fees due to said Town; that in addition to so much of the foregoing as was turned over to him by said Collector, said Supervisor received from first Tuesday in April, 1932, to present, from County Collector and County Treasurer of Cook County, or from County Clerk thereof, or partly from one and partly from the other, the following money due said Town for personal property taxes, real estate taxes and redemption from tax forfeitures: during 1932, taxes for 1930, \$281,055.75; during 1933, taxes for 1931, \$408,462.04; during 1934, taxes for 1932, \$205,700.00; during 1935, taxes for 1933, \$224,522.58; during 1935, taxes for 1934, \$219,260.42; during 1936, taxes for 1935, \$238,174.97; during 1937, taxes for 1936, \$269,928.47; during 1938, taxes for 1937, \$228,424.27; and at various times during said period beginning first Tuesday in April, 1932, the following respective amounts for redemptions from taxes for: 1927, \$169; 1928, \$20,835; 1929, \$50,135; 1930, \$157,430; 1931, \$109,794; 1932, \$74,706; 1933, \$33,221; 1934, \$24,324; 1935, \$6,603; 1936, \$1,008; that said Supervisor also received during each year beginning with 1932, from Cicero School Board No. 99, \$12,000 per year belonging to said Town, and also received from proceeds of bonds of said Town: Water bonds dated Dec. 1, 1935, \$891,000; bonds for corporate purposes dated Nov. 9, 1936, \$71,000; bonds for corporate purposes dated March 15, 1933, \$624,000; bonds for corporate purposes dated January, 1935, \$58,000; bonds for corporate purposes dated July, 1935, \$330,000; and bonds for corporate purposes



dated Sept. 1, 1936, \$245,000; that said Collector from time to time from first Tuesday in April, 1932, to present, has taken and converted to his or her own use from tax collections made various excessive and unlawful sums of money in excess of the \$10,000 per year to which said Collector was entitled for salary, expenses and office maintenance, and said tax collections and money so taken and converted by said Collector amounted to the following respective sums for the following respective years: 1932, collected \$295,969.54, retained \$15,196.18; 1933, collected \$230,562.53, retained \$11,856.49; 1934, collected \$260,779.46, retained \$21,282.69; 1935, collected \$326,216.55, retained \$23,442.89; 1936, collected \$341,685.12, retained \$23,958.99; 1937, collected \$397,233.02, retained \$25,573.09. Moreover, said expenses and office maintenance were paid out of funds otherwise appropriated by said Town, and not out of money so retained.

That although from first Tuesday in April, 1932, to present, there has been received and collected for said Town by its Collector and Supervisor funds amply sufficient to have paid all ~~in~~ its matured indebtedness, said officers and trustees claim and pretend that its funds were not sufficient for such purpose and that its bond <sup>in</sup> issue passed July 3, 1939, is necessary in order to pay said judgments, whereas in truth, if said funds were properly accounted for and used for that purpose they would be ample to pay said indebtedness, and said bond issue is unnecessary and ought to be enjoined. Said water bond issue, from which proceeds of \$891,000 were received, was issued in amount of \$962,000 and sold by said trustees and officers then in office at a discount, contrary to statute, Pars. 460.1 and 460.6, Ch. 24, Ill. R. S. 1937, and by reason thereof said officers and trustees ought to be compelled to account for and pay over for benefit of said Town the difference between par value of said bonds and amount for which they were sold,

That ever since first Tuesday in April, 1932, said officers



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and trustees have kept upon the payrolls of said Town persons who have performed no work, but have received from said Town money under the false pretense that said money was paid them for salary or wages. During all said time said officers and trustees have caused to be paid to various corporations and individuals money, under the false pretense that same was paid for goods, wares and merchandise purchased by said Town, whereas in truth no such purchases were made. The various particulars of the matters set forth in this paragraph are unknown to plaintiffs, and upon diligent inquiry cannot be ascertained, but the truth would appear to be as set forth herein if defendants would truthfully disclose and set forth the facts.

That much of the money collected which ought to have been used to pay the expenses for which such appropriations were made has been diverted to other purposes, and the indebtedness for which such appropriations were made has been allowed by defendants to remain unpaid, including money due said Public Service Co. of No. Ill.

That as the wrongful acts set forth in this complaint are the acts of said officers and trustees who control the affairs of said Town and the attorneys thereof, they will not prosecute diligently and honestly any suit of said Town for recovery of any money belonging to it and wrongfully retained or converted as aforesaid, and as the foregoing greatly damages plaintiffs as said taxpayers, plaintiffs institute and prosecute this suit for benefit of said Town, in order that money justly due and belonging to it may be recovered and placed in a fund under control of the court herein, out of which, after deducting and paying therefrom plaintiffs' expenses and attorney's fees in this suit, restitution of the balance may be made to said Town. A receiver ought to be appointed herein to receive, collect and hold, subject to order of court any money ordered paid under any decree herein. Prays disclosure of all facts and circumstances, accounting, receiver of all money which





may be directed to be paid to him, that defendants be enjoined pending this suit and permanently upon final decree, from issuing, selling, disposing of or receiving bonds or any of them provided to be issued by said ordinance so passed July 3, 1939, and making any wrongful or unlawful payments or transfers of funds of said Town, or from receiving any of same; that defendants who have misappropriated or converted to their own use or diverted from the proper purpose any money, funds or securities of said Town may be required to restore and pay same, that each and all sureties on each and all official bonds of any and all said officers may be required to pay damages for which they may be liable under the terms of each of said respective bonds, that said officers and trustees who may have been found guilty of such wrongful acts sufficient to justify their removal from office may be so removed, and for general relief.

Said complaint is verified by affidavit that the matters and things in said complaint stated are true in substance and in fact, except matters and things therein stated to be upon plaintiffs' information and belief, and said matters affiant is informed and believes are true.

There is attached to said complaint as Exhibit A a copy of said ordinance for issue of \$632,000 judgment funding bonds of said Town, providing for levy of a direct annual tax sufficient to pay principal and interest thereof. Said ordinance recites that said Town has outstanding obligations of \$632,242.94, represented by judgments entered against it in favor of the following respective plaintiffs, in various courts of said Cook County: Michael J. Bransfield & Sons, Nov. 5, 1937, \$19,966.23 and \$18.30 costs; still unpaid, \$11,253.18 and \$98.46 interest. Edward J. Schmidt, Nov. 18, 1937, \$1203.76 and \$18 costs; still unpaid \$1203.76 and \$99.81 interest. Chas. H. Lithgow, May 12, 1931, \$90 and \$18 costs; still unpaid, \$90 and \$36.79 interest. F. J. Carroll, May 13, 1935, \$240



and \$13 costs; still unpaid, \$240 and \$50.07 interest. Maynard R. Fauble, Feb. 10, 1939, \$390.273.91 and \$18.30 costs; still unpaid \$390,273.91 ~~and \$18.30 costs; still unpaid \$390,273.91~~ and \$8,401.73 interest. Public Service Co. of Ill., Feb. 10, 1939, \$201,482.66 and \$18.30 costs; still unpaid, \$201,482.66 and \$4,337.47 interest. Illinois Bell Telephone Co., Sept. 27, 1937, \$12,088.74 and \$18 costs; still unpaid, \$7,086.24 and \$96.52 interest. Carl A. Miller, Dec. 12, 1936, \$6,342.25 and \$18.30 costs; still unpaid \$2,243.37 and \$52.97 interest. Mose Levy, Feb. 8, 1935, \$6,212.84 and \$23.70 costs; still unpaid, \$878.68 and \$194.90 interest. O'Connell (substitute Albers), Receiver, Apr. 16, 1937, \$3,542.48 and \$18 costs; still unpaid, \$3,542.48 and \$398.04 interest; and, whereas, there are no funds available to pay said judgments and it is deemed advisable they be funded by borrowing money and issuing bonds, said bonds be issued bearing 4% per annum interest (describing them), due July 15, 1959; that for payment of interest on said bonds and sinking fund, there is levied on all taxable property in said Town, in addition to all other taxes, a direct annual tax for 1939 sufficient to produce \$50,560 interest to July 15, 1941; for each of the years 1940 to 1956, inclusive, tax sufficient to produce \$60,280 for interest and principal; for 1957, a tax sufficient to produce \$62,280 for interest and principal; that forthwith upon passage and publication of this ordinance a certified copy be filed with the County Collector, who shall, in each and all of said years, extend said taxes; that said bonds be executed upon this ordinance becoming effective and be deposited with the Treasurer of said Town and by him delivered to Seipp, Princell & Co., purchaser thereof, upon receipt of purchase price, not less than par and accrued interest to date of delivery. Said ordinance passed and recorded July 3, 1939, published July 7, 1939.

There is also attached to said complaint as Exhibit B copy of said Act constituting the charter of said Town, which provides the officers thereof shall consist of a Supervisor, Assessor,

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Collector and Town Clerk, as provided by law for such officers in other towns in Cook County; that there shall be four trustees of said Town; that the government and corporate powers of said Town shall be vested in a Board of seven trustees, to consist of the Supervisor, Collector, Assessor and the four trustees; that said Board shall elect a President; that the Town Clerk shall keep correct minutes of all proceedings of said Board, record in a book kept for that purpose all ordinances, orders or regulations, which records shall be open to inspection of any inhabitants of said Town; that said Supervisor shall be ex-officio Treasurer of said Town and shall receive and hold all moneys belonging to it, and shall give bond; that it shall be his duty to keep a correct account of all moneys received and paid out by him and to furnish the Board when required a statement of the moneys in his hands, and he shall receive such compensation as shall be allowed him by said Board, not exceeding 2% of all moneys received by him; that the Collector shall give bond and after June 1, 1869, shall receive 2% commission on all town taxes and special assessments collected by him; that the said Board may appropriate so much money as they deem necessary and all money so appropriated shall be deemed a tax on taxable property of said Town, and in no other manner nor by any other vote or authority shall money be appropriated or collected, except in case of special assessment; that no money shall be paid out by said Treasurer unless same shall have been ordered by the Board, and then only upon warrant drawn on him by the Clerk, countersigned by the President, specifying what particular fund same shall be paid out of, and it shall be the duty of the Clerk to keep an account of all such warrants; that said Board shall, at the annual election, present to the voters a printed report, showing the amount of moneys ordered and collected and from what source derived, and the manner in which same have been disbursed; that the members of said Board shall be entitled to \$3 for each



day's attendance at meetings, but not for more than one day's attendance in any one week; that said Board shall have general management and control of the finances and all property belonging to said Town, and power by ordinances, regulations or by-laws to (various powers specified in said Act),

There are attached to said complaint copies of the appropriation ordinances of said Town for each year from 1932 to 1939, both inclusive.

There is also attached to said complaint a copy of said statement of the said Town Treasurer of his receipts and disbursements for the year ending December 31, 1938, showing, among other things, that in the corporate fund he had on hand January 1, 1938, \$179,276.69, received in that fund during the year 1938, \$1,857,558.15 additional, making a total of \$2,036,834.84; disbursed during that year \$1,933,023.41 of that fund; and also showing the money on hand, receipts and disbursements in the water fund and special assessment fund, of no special importance here. Among the receipts so listed in the corporate fund were general taxes 1932, \$11,044.80; 1933, \$8,843.48; 1934, \$14,562.24; 1935, \$19,425.41; 1936, \$105,410.87; 1937, \$770,654.24; tax anticipation warrants sold, 1938, \$350,000; Town Collector, licenses, etc., \$197,536.29. Among the disbursements to the Town Collector were 2%, \$3,475.96 and cost of collecting, \$16,095.16, and to the Town Treasurer 2%, \$5,000.

Maynard R. Fauble and Seipp, Princell & Co., defendants, filed a motion to dismiss the cause as to them, in which motion many grounds in the nature of a demurrer are set forth. Certain paragraphs of the motion set up alleged facts as a defense, which facts do not appear on the face of the complaint. Three exhibits are also attached to the motion. The trial court sustained said motion and entered the following order:

"This cause coming on to be heard on Motion of the





Defendants, Maynard R. Fauble and Seipp, Princell & Co., a Corporation, to Dismiss the Complaint herein, and the Court having read the Complaint and said Motion of the above named Defendants and having heard the arguments of counsel thereon, and being fully advised in the premises:

"It is hereby Ordered, Adjudged and Decreed that said Motion to Dismiss the Complaint herein be and is sustained, and the said Defendants, Maynard R. Fauble and Seipp, Princell & Co., a Corporation, be and are dismissed; and

"It is further ordered, Adjudged and Decreed that all costs sustained by these Defendants, and each of them, be charged to and taxed against the Plaintiffs herein."

After the entry of the above order, Edward J. Schmidt, Charles E. Lithgow, F. J. Carroll, Mose Levy, and Charles H. Albers as Receiver of the Peoples Bank & Trust Company and Pinkert State Bank, defendants, filed a motion to dismiss the complaint as to them; Michael J. Bransfield & Sons, Carl A. Miller, Public Service Company of Northern Illinois and Bell Telephone Company, defendants, also made separate similar motions. All of the motions were allowed and orders were entered similar to the one that was entered upon the Fauble motion. Plaintiffs appeal from all of said orders.

In this court all of the defendants who were dismissed from the cause, save Illinois Bell Telephone Company, joined in a motion to dismiss plaintiffs' appeal. The decision upon the motion was reserved to the final hearing of the cause. The ground for the motion is that the orders entered were not final orders and therefore an appeal does not lie therefrom. By the orders in question the said defendants were dismissed from the proceedings and the case was fully disposed of so far as they were concerned. Cases cited by said defendants in support of their motion have no application to the instant orders. In support of their motion said defendants also rely upon the general rule that a decree dismissing a bill of complaint as to one or more defendants is not final nor

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appealable until there has been a final disposition of the cause as to the remaining defendants, but plaintiffs insist that the instant suit comes under an exception to the general rule, "either because the orders or decrees appealed from dispose of the only matters in which the dismissed defendants are interested, - the injunction sought against the issuing and receiving of bonds and the enforcement of an alleged fraudulent judgment, - or because the portion of the suit having to do with the dismissed defendants involves important public interests which ought to be given immediate protection, and great hardship would result from delay in appellate review until final disposition of the suit as to all defendants." Cases cited by defendants (Bucklen v. City of Chicago, 166 Ill. 451, 455, and Dreyer v. Goldy, 171 Ill. 434, 437) state that there are exceptions to the general rule, but in each of said citations the court held that the case did not come within the exceptions. See McCarthy v. C. T. & T. Co., 264 Ill. App. 423, where the subject matter of exceptions to the general rule is fully considered and numerous cases are cited and reviewed. In support of their right to appeal plaintiffs argue: "The dismissed defendants had all recovered judgments at law against the Town, and were made defendants because the complaint sought to enjoin the issuing of bonds which, or the proceeds of which, were intended to be used to pay the said judgments, and the receiving thereof by the judgment creditors, and because, in the Fauble judgment, there were included various illegal and fraudulent claims, for which reason it was sought to enjoin the enforcement of so much of the Fauble judgment as covered claims of that character. The other portions of the suit sought a recovery from the various Town officers and their bondsmen of money misappropriated and other relief having nothing whatever to do with the rights of the judgment creditors. Therefore, when the court dismissed the judgment creditors it decided that the judgments were binding as far as they were concerned and that they could not be enjoined from receiving bonds



or money in payment of their judgments. That was all that concerned them and all that they were interested in. Whether the Town officers and their bondsmen could be compelled to account for and restore moneys unlawfully diverted was a matter of no concern to the judgment creditors as long as their judgments were not affected. However, the controversy as to those judgments, in view of the large amount involved, certainly involves important public interests which ought to be given immediate protection, and it would be a hardship on the Town and its taxpayers to delay appellate review of a decision making those judgments unassailable until the end of what may be a long drawn out controversy with the officers and their bondsmen. Whether a collusive judgment embracing many fraudulent and illegal items may be subjected to the corrective jurisdiction of a court of equity, and whether the judgment creditors may receive bonds unnecessary to be issued, instead of receiving payment of their judgments from Town funds otherwise available for which appropriations have actually been made, are matters that ought to be finally determined at the earliest opportunity. That such considerations bring the case within the exceptions to the general rule and make it immediately appealable is well established in Illinois." Viewing the question from the standpoint of plaintiffs' theory of fact and law, we think that the instant appeal comes within the exceptions to the general rule.

In support of its motion to dismiss the appeal, defendant Public Service Company of Northern Illinois contends that "the bonds in question have already been issued, received and disposed of; judgment creditors have been paid and their judgments satisfied. A writ of injunction will not and cannot issue to restrain something that has already happened. The issues presented on this appeal are moot and could only result in a decision on abstract propositions, and therefore in accordance with the well-settled rule the appeal must be dismissed." Plaintiffs' answer to this contention is as follows: "In the report of proceedings it is



stated that on the hearing of the motions to dismiss, which constitute the sole subject-matter of this appeal, no evidence was offered or received, but said motions were heard and argued upon the law only. The hearing was on motions in the nature of a demurrer and there is no basis in the complaint for alleging that the bonds were sold and delivered July 11, 1939, or at any other time prior to the entry of the orders appealed from. The statement with respect to what was done July 11, 1939, is found in the certificate of the Town Treasurer, attached to the motion of Fauble and Seipp, Princell & Co. to dismiss and its only function would be as evidence tending to show a completed transaction if admitted in evidence at the hearing on the facts, where, of course, evidence to the contrary could be offered by plaintiffs. While the certificate says that the bonds have been delivered, yet it does not say they have been paid for by the purchaser nor that they have become effective. In fact, they could not well have become effective prior to the date of filing of plaintiffs' complaint, because, as stated in the motions of defendants Michael J. Bransfield & Sons and defendant Carl A. Miller, the ordinance authorizing the bonds did not take effect until July 17, 1939, ten days after its publication." The trial court in passing upon the motion of Fauble et al. to dismiss had no right to consider the certificate of the town treasurer attached to the motion. Neither have we the right to consider it in passing upon the motion to dismiss this appeal. The motions of certain defendants to dismiss this appeal are denied.

This brings us to a consideration of plaintiffs' contention, strenuously argued, that the trial court erred in sustaining the motions in question and in dismissing the complaint as to the moving defendant or defendants. The first motion to dismiss allowed by the trial court was that of Fauble and Seipp, Princell & Co. As to that order plaintiffs state: "The motion of Fauble and Seipp, Princell & Co. to dismiss in the nature of a demurrer





was improperly sustained, because there were included in the motion allegations amounting to an answer to some of the same portions of the complaint as were demurred to. These portions of the motion (Pars. 6, 7c, 15, 18 and 21) waived and overruled the motion to strike in the nature of a demurrer;" that Exhibit B., attached to the Fauble et al. motion, was a certificate of the treasurer of the Town of Cicero "that said judgment funding bonds have been delivered to purchaser thereof, Seipp, Princell & Co., in accordance with contract of sale at not less than par and accrued interest; that total indebtedness of said Town, including amount of said bonds, is \$1,750,242.49, and does not exceed any constitutional or statutory limitation. Dated July 11, 1939." That Exhibit B asserted new facts is obvious from an examination of the complaint, and that the purpose of Exhibit B was to enable said defendants to raise the plea that the issues as to them were moot, is also plain. Said defendants' motion to strike was waived by reason of Exhibit B attached to it. The trial court should have treated defendants' motion to strike as an answer, and it was error for the court to dispose of the cause on the motion to strike. (See Young v. Jameson, 307 Ill. 71.) But defendants say that plaintiffs waived the point by not making the objection they now make to the motion. Appellees' motion to strike in the nature of a demurrer was overruled by what amounted to an answer (Exhibit B). Young v. Jameson holds, in effect, that a motion to strike the demurrer and answer from the files would have been improper (p. 74); that as the motion to strike had been overruled by the answer the motion must be entirely disregarded (p. 75). In the instant case the trial court should have treated the motion of Fauble and Seipp, Princell & Co. as an answer, and it was error for the trial court to sustain the motion and dismiss the complaint as to said defendants. Defendant Illinois Bell Telephone Company, a corporation, has not filed an appearance in this court. The Public Service Company of



Northern Illinois filed an appearance and a motion to dismiss the appeal as to it, but has not filed a brief. It appears, therefore, that neither of these two defendants has seen fit to defend the order entered on its motion.

Maynard R. Fauble; Seipp, Princell & Co., a corporation; Edward J. Schmidt; Charles H. Lithgow; F. J. Carroll; Mose Levy; Charles H. Albers, Receiver, etc.; and Michael J. Bransfield & Sons, a corporation, have filed a brief in this court, in which they contend (1) that the orders as to them were not final and, therefore, not appealable; (2) the complaint does not state a good cause of action against these defendants, and (3) the questions involved in this appeal are moot. We have heretofore disposed of the first and third contentions. As to contention (2): Defendants contend that plaintiffs, contrary to the requirements of section 33 of the Civil Practice Act, "have attempted to join in one complaint an injunction proceeding, an action for the misappropriation or diversion of municipal funds, a damage suit against sureties on official bonds, a proceeding in the nature of quo warranto to remove officers and trustees who might be guilty of wrongful acts, and lastly, any other persons who might be guilty of similar acts of conspiracy, etc. Obviously, this complaint does not conform to the requirements of Section 33 of the Practice Act." It is a sufficient answer to this contention to say that in none of the motions to dismiss was the point involved in the instant contention raised, and it would be highly inequitable to permit the said defendants to make the point for the first time in this court.

Defendants contend, as we understand the contention, that plaintiffs have attempted to make certain persons defendants merely by reference to an exhibit and that such procedure is contrary to proper practice. It would be a sufficient answer to this contention to say that no such point was made in the said defendants' motion to strike. Defendants cite in support of this contention



Fetherston v. National Republic Bancorporation, 280 Ill. App. 151, where the court held (p. 163): "Persons are not made parties to a suit by having their names appear only in an exhibit attached to the bill." That rule is not applicable to the complaint before us. In the instant case defendants recognized themselves as defendants, and in their motions to strike describe themselves as defendants.

As we have heretofore held that the Fauble et al. motion to strike amounted to an answer, should have been treated as such, and that the court erred in treating the motion as a proper motion to strike and in dismissing the proceedings as to Fauble et al., it is therefore unnecessary for us to consider the contention of Fauble et al. that the complaint did not state a good cause of action as to them. Michael J. Bransfield & Sons, Edward J. Schmidt, Charles H. Lithgow, F. J. Carroll, Mose Levy, and Charles H. Albers, Receiver of the Pinkert State Bank and Peoples Bank & Trust Company, defendants, contend that the complaint does not contain any specific allegations as to them; that any allegations in the complaint as to said defendants are mere conclusions of the pleader, and, therefore, the trial court was justified in sustaining the motions of the said defendants. Michael J. Bransfield & Sons and the other defendants who join in the instant contention are judgment creditors, and it must be remembered in considering said contention that the principal defendants, that is, the defendants that are charged in the complaint with wrongful and fraudulent acts, remain in the case, and there will be a trial as to them. Plaintiffs concede that they make no charges of fraud against the judgment creditors who have joined in the instant contention, but they contend that in any event they are proper parties to the cause. To quote from plaintiffs' brief: "While the judgment creditors may not have been necessary parties, especially those whose judgments represent valid obligations, yet they were, nevertheless, proper parties, for they



were all interested, indirectly, at least, in the proposed bond issue, through its intended use to pay their judgments, and if they were to be enjoined from receiving the bonds, or if a fraudulent judgment creditor was to be enjoined from receiving payment in bonds or cash, they were necessary parties.

"Parties to actions are divided into necessary or indispensable parties, and proper but not indispensable parties. Necessary parties are those without whom the court will not proceed to a decree even as to the parties before it.' Jones v. Bryant, 204 Ill. App. 609, 617.

"The second class of proper parties includes those whose interest is such that they may be made parties or omitted at the option of plaintiff. \*\*\*

"Parties who are proper but not indispensable include all persons who have an interest in the controversy, but whose interests are separable from those of the parties before the court and will not be directly and necessarily affected by a decree which does full justice between them and is conformable to equity and good conscience. \*\*\*

"Formal or nominal parties, sometimes termed "proper parties," are those who have no interest in the controversy between the immediate litigants, but who have an interest in the subject matter which may be conveniently settled in the suit and thereby prevent future litigation. Such persons may be made parties or not at the option of plaintiff, \*\*\* The criterion by which to determine when one is a mere formal or nominal party is whether or not a decree is sought against him.' 21 C. J. 298, 299, 303.

"In one aspect of the case it would be desirable to have the judgment creditors enjoined from receiving bonds and any fraudulent judgment creditor enjoined from receiving payment, and for that purpose they would be necessary parties as well as proper parties. If they were not made parties and the Town officials should deliver





bonds to them the only redress would be such relief as might be obtained by suit against the Town officials and the sureties on their bonds. If the judgment creditors were made parties, even though no temporary injunction were issued, and delivery of the bonds should be made pendente lite, the judgment creditors could be made to return the bonds if the plaintiffs should be successful on final decree. Moreover, if the Town officials should pay a fraudulent judgment in the absence of a temporary injunction no relief could be obtained against the official making the payment unless the plaintiffs could prove that the particular official making that payment was a party to the collusive arrangement by which that judgment was obtained, for the statute provides that the pendency of a suit alone, without an injunction, shall not affect the liability of any public officer making such payment (Par. 18, Ch. 102, Ill. R. S. 1939, p. 2204). On the other hand, if the fraudulent judgment creditor receives the money pendente lite, the plaintiffs may have the aid of all the powers of a court of equity to compel restitution, if such judgment creditor is a party to the suit. Dunne v. County of Rock Island, 288 Ill. 359, 362. Gulick v. Hamilton, 287 Ill. 367, 374. New H. C. Co. v. Kochersperger, 175 Ill. 383, 395. Lambert v. Alcorn, 144 Ill. 313, 330."

Bransfield & Sons and the other defendants who have joined in the instant contention have not attempted to answer this pertinent argument of plaintiffs. We are satisfied that the said defendants are, at least, proper parties to the suit. Whether they are likely to become necessary parties to the suit need not be considered at the present time.

All of the decretal orders of the Circuit court of Cook county appealed from are reversed and the cause is remanded with directions to the trial court to overrule all of the motions to dismiss, and for further proceedings not inconsistent with this opinion.

DECRETAL ORDERS REVERSED AND CAUSE REMANDED  
WITH DIRECTIONS.

Sullivan and Friend, JJ., concur.



PEOPLE EX REL. FIRST NATIONAL  
BANK OF STEVENS POINT, WISCONSIN,  
Appellee,

v.

VILLAGE OF STICKNEY, a Municipal  
Corporation; JAMES J. MEJDA,  
Village Treasurer of the Village  
of Stickney; WILLIAM LOEFFLER,  
President of the Board of Trustees  
of the Village of Stickney;  
WILLIAM SVOLBA, Village Clerk of  
the Village of Stickney,  
Appellants.

APPEAL FROM SUPERIOR  
COURT OF COOK COUNTY.

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MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

From a judgment order awarding a writ of mandamus entered  
December 20, 1939, respondents appeal.

The verified petition for mandamus as amended alleges,  
in substance, that relator is a banking corporation, organized  
under the National banking laws; that it owned certain special  
assessment bonds of the Village of Stickney issued in anticipation  
of the collections of specified installments of Supplemental  
Specials 15 and 16 of said Village levied to pay costs of con-  
structing water mains in certain streets; that all of said bonds  
are payable solely out of installments when collected; that the  
bonds were duly executed and issued in full compliance with the  
law and ordinances. The petition further alleges:

"VIII. Your relator is informed and so states the fact  
to be that the said defendants, Village of Stickney, a Municipal  
Corporation, Charles Lejsek, Village Treasurer of the Village of  
Stickney, William Loeffler, President of the Board of Trustees of  
the Village of Stickney, have collected some or all of that part  
of said Special Assessments Nos. 15 and 16, respectively, of said  
Village of Stickney, Cook County, Illinois, to anticipate the  
collection of which the said improvement bonds hereinabove  
referred to were issued by said Village of Stickney.

"IX. Your relator further says that the money so collected

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by said defendants in payment of said third installments of said Special Assessments was received and is now held by said defendants as a special fund for the payment of said improvement bonds herein referred to and so issued, as aforesaid, and now owned and held by your relator, and by reason of such collection by said defendants of said Special Assessment, it has become and is now the duty of said defendants, and each of them, to make payment of the amounts designated in said improvement bonds at the office of the Treasurer of said Village of Stickney and to fully pay your relator for said improvement bonds upon presentation thereof to said defendants at the office of said Treasurer of said Village of Stickney.

"X. Your relator further states that since the maturity of said improvement bonds and after the same and each of them became due and payable under the terms thereof, your relator caused the same to be presented at the Office of said Village Treasurer and made due and proper demand upon said Village of Stickney at said office of the Treasurer of said Village of Stickney for the payment of said improvement bonds and each of the same by said Village of Stickney, and your relator avers that said defendants, Village of Stickney, a Municipal Corporation, Charles Lejsek, Village Treasurer of the Village of Stickney, William Loeffler, President of the Board of Trustees of the Village of Stickney and William Svolba, Village Clerk of the Village of Stickney, and each of them have refused to comply with said demand so made, as aforesaid, and each of said defendants has refused to pay said bonds or any of them upon the presentation of the same, as aforesaid, notwithstanding that they have ample funds so to do.

"XI. Your relator further states that said defendants and each of them have at all times recognized and admitted the validity and legality of said improvement bonds and that the same were true and valid obligations of said Village of Stickney.



"XII. Your relator further states that said Special Assessments Nos. 15 and 16 have been collected by the said defendants and that they have sufficient funds from said collections to pay said bonds and the accrued interest thereon."

The petition prays that the Village, its treasurer, clerk and president be compelled by the writ of mandamus to make payment to relator of said bonds upon presentation at the office of the treasurer of said Village and for such further orders as justice might require.

In respondents' ~~answer~~ answer to the petition they state:

"1. Defendants admit paragraphs 3, 4, 5, 6, and 7 of said petition.

"2. Defendants deny paragraphs 9, 10, 11 and 12 of said petition.

"3. Defendants state that they have not sufficient information upon which to base an answer or belief as to paragraph one of said petition.

"4. Further answering said petition, these defendants state that the relator should not have the relief sought in said petition for the reason that said relator fails to state a good and sufficient cause of action herein, and for a further reason that the relief sought is contrary to the law in such case made and provided."

Relator filed a verified replication to the answer, in which it states that relator should not be barred because of anything said in respondents' answer; that paragraphs one to eight are not denied, and that the allegations in paragraphs nine to twelve are true.

The cause was referred to a master in chancery to hear evidence concerning amounts collected in Special Assessments 15 and 16, the disposition made thereof, and the pro rata share of

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collections to which the relator is entitled as owner of bonds, and that the master report his findings and conclusions to the court. The findings of fact and conclusions of law of the master are as follows:

"(8) The relator, First National Bank of Stevens Point, Wisconsin, is a corporation duly chartered under the banking law of the United States of America \* \* \*. The relator is actively engaged in the business of banking in \* \* \* Stevens Point, Wisconsin.

"(9) The respondent, Village of Stickney, is a Municipal Corporation \* \* \*. The other respondents are Charles Lejsek, William Loeffler and William Svolba. They are respectively Village Treasurer, President of the Board of Trustees, and Village Clerk of the Village of Stickney.

"(10) An act of the Legislature of the State of Illinois, entitled 'An Act Concerning Local Improvements', approved June 14th, 1887, in force July 1st, 1887, as subsequently amended, is applicable to the said Village of Stickney. In pursuance with said Act, the said Village proceeded to levy and confirm the making of certain special assessments for the construction of water mains and sewers in the said Village. Said special assessments are known and referred to as Nos. 15 and 16.

"(11) In anticipation of funds to be collected in accordance with the said special assessments, said \* \* \* Village \* \* \* did, on July 1, 1930, issue certain series of anticipation warrants or bonds. Said bonds, issued in anticipation of the collection of Special Assessment No. 15, aggregated Thirty-nine Thousand One Hundred Dollars. The bonds issued in anticipation of the collection of Special Assessment No. 16 originally aggregated Seventy-two Thousand Dollars.

"(12) Relator \* \* \* is the legal and bona fide owner and holder of all of the said bonds issued in anticipation of said

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Special Assessment No. 15, aggregating Thirty-nine Thousand One Hundred Dollars. Relator is also the owner and holder of bonds issued in anticipation of collection of Special Assessment No. 16 in the total principal sum of Forty-four Thousand Dollars. All of said bonds were introduced in evidence on behalf of the relator. The petition of the relator contains an accurate itemization of the said bonds. Interest has been paid on all of the bonds owned by the relator up to December 31st, 1931, with the exception of the sum of Four Hundred Sixty-eight Dollars of said installment of interest which remains due and owing.

"(13) Each of said bonds recites on its face that it is issued in anticipation of the collection of certain special assessments and that said bonds and the interest thereon are payable solely out of said installments when collected, with interest at the rate of six per cent per annum from and after July 1st, 1930, payable annually on December 31st of each year.

"(14) It appears \* \* \* that certain bonds with reference to Special Assessment No. 16 were redeemed, paid and cancelled prior to May 1st, 1933. No part of the bonds issued with reference to Special Assessment No. 15 were redeemed at any time. It appears \* \* \* that said bonds were all originally issued to one, J. M. Donahue, connected with a contracting company named J. M. Donahue & Company, which performed the services arising out of which the said bonds were issued.

"(15) It further appears \* \* \* by virtue of a stipulation of the parties that the records of the respondent, Village of Stickney, discloses that Twenty-five Thousand Dollars in principal of said bonds of Special Assessment No. 16 were redeemed by a check in said sum, dated August 27th, 1930, payable to one, G. Elder. Similarly, on December 6th, 1930, bonds of said Special Assessment No. 16 were redeemed by a check payable to G. Elder in the sum of One Thousand Dollars, and on December 7th, 1930, Two Thousand Dollars of said bonds of said Special Assessment No. 16 were



redeemed by a check for said sum, payable to the order of George Elder.

"(16) As a matter of law, the Master concludes that all sums collected by the respondent, Village of Stickney, a Municipal Corporation, or its officials, on account of said Special Assessments Nos. 15 and 16, constitute a trust fund to be administered by said respondents for the equal and pro-rata use and benefit of all of the owners and holders of outstanding bonds or warrants issued in anticipation of the collection of said special assessments. As a matter of law, the Master concludes that therefore it was the duty of the respondents to apply such sums as were available for payment of said anticipation warrants in a pro-rata manner so as to divide the same equally between all of the owners and holders of said bonds. Accordingly, the Master concludes that said respondents should be obliged to account to the relator for the pro-rata share to which relator is entitled out of any and all moneys collected by said respondents out of said Special Assessments Nos. 15 and 16.

"(17) It appears from the testimony that the respondent, Village of Stickney, collected, up to April 30th, 1936, on account of the principal amount of Special Assessment No. 15, the net sum of Twelve Thousand One Hundred Forty-eight and 31/100ths Dollars. Subsequent to April 30th, 1936 and until April 30th, 1937, said respondent collected a total sum of Seventeen Hundred Ninety-five and 92/100ths Dollars on account of said Special Assessment No. 15. The total sum thus collected by the respondent is the sum of Thirteen Thousand Nine Hundred Forty-four and 23/100ths Dollars. The Master finds that since relator is the owner of all bonds issued in anticipation of the collection of said Special Assessment No. 15, said entire sum of Thirteen Thousand Nine Hundred Forty-four and 23/100ths Dollars should be paid by respondent to relator, to be applied on account of the indebtedness due relator by virtue of its ownership of said special assessment bonds.



"(18) It further appears \* \* \* that said Village \* \* \* has collected on account of the principal amount of said Special Assessment No. 16, up to April 30th, 1936, the total sum of Twenty-four Thousand Six Hundred Twenty-five and 19/100ths Dollars. The records of the respondent indicated that of this series, it redeemed bonds in the principal sum of Twenty-eight Thousand Dollars, leaving a deficit or overdraft in the principal account of said special assessment. It further appears that with reference to the interest fund on said Special Assessment No. 16, the respondent collected a total of Four Thousand Five Hundred Eighty-three and 61/100ths Dollars up to April 30th, 1936. The respondent has redeemed interest coupons in the sum of Fifteen Thousand One Hundred Eighty Dollars, leaving a substantial overdraft. Subsequent to April 30th, 1936, and until April 30th, 1937, the respondent, Village of Stickney, has collected the total sum of Three Thousand Eight Hundred Six and 95/100ths Dollars under said Special Assessment No. 16.

"(19) The Master therefore finds that up to April 30th, 1937, the respondent, Village of Stickney, has collected on account of Special Assessment No. 16, both on principal and interest, the total sum of Thirty-Three Thousand Fifteen and 75/100ths Dollars.

"(20) The Master finds that the relator owned Forty-four Thousand Dollars in Special Assessment bonds No. 16 out of a total issue of Seventy-two Thousand Dollars. Hence, the relator owns sixty-one per cent of the entire issue of said bonds. Had the total sum collected by said Village been properly disbursed, the relator would have been entitled to receive sixty-one per cent of Thirty-three Thousand Fifteen and 75/100ths Dollars, being the total amount collected, or the sum of Twenty Thousand One Hundred Thirty-nine and 51/100ths Dollars. The Master accordingly recommends that the respondents herein be obliged to account to the relator for said sum of Twenty Thousand One Hundred Thirty-nine and 51/100ths Dollars, being the proper pro-rata share due to the





relator herein out of the funds collected by the respondents on account of said special assessment.

"(21) The Master accordingly recommends that a Writ of Mandamus in the form provided by law issue, directing the respondents to pay the sums above set forth to the relator; and that such further, other and different orders may be entered herein as are necessary and proper to effect that end."

The trial court overruled the exceptions to the master's report, approved the report, and entered a judgment order in accordance with the report of the master. The ordering part of the judgment order is as follows:

"7. It Is Therefore Ordered and Commanded ~~that~~ the Village of Stickney, a municipal corporation; James J. Mejda, Village Treasurer of the Village of Stickney, successor to Charles Lejsek, former Treasurer; William Loeffler, President of the Board of Trustees of the Village of Stickney; and, William Svolba, Village Clerk of the Village of Stickney, defendants herein, and their successors, account for and pay to the plaintiff the said sum of Six Thousand Six Hundred Twenty-nine and 42/100ths Dollars on account of the funds collected by said defendants in Village of Stickney Special Assessment No. 15 (being a supplemental to Special Assessment No. 4); and that said defendants, and each of them, and their successors, further account for and pay to the plaintiff the sum of Twenty Thousand One Hundred Thirty-nine and 51/100ths Dollars, on account of the funds collected by said defendants in Village of Stickney Special Assessment No. 16 (being a supplemental to Special Assessment No. 6), without excuse and delay.

"And It Is Further Ordered and Adjudged that a peremptory Writ of Mandamus forthwith issue out of the Clerk's office of this Court, under the hand of said Clerk and the Seal of this Court, directed to the said defendants, Village of Stickney, a Municipal



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Corporation; James J. Mejda, Village Treasurer of the Village of Stickney, Successor to Charles Lejsek, former Treasurer; William Loeffler, President of the Board of Trustees of the Village of Stickney; and, William Svolba, Village Clerk of the Village of Stickney, and their respective Successors in office, ordering and commanding them that they, the said defendants, and their successors, do forthwith and without excuse or delay, pay to the plaintiff First National Bank of Stevens Point, Wisconsin the said sum of Six Thousand Six Hundred Twenty-nine and 42/100ths Dollars on account of the funds collected by said defendants in Village of Stickney Special Assessment No. 15 (being a supplemental to Special Assessment No. 4); and that the said defendants, and each of them, and their successors, further pay to the plaintiff the sum of Twenty Thousand One Hundred Thirty-nine and 51/100ths Dollars on account of the funds collected by said defendants in Village of Stickney Special Assessment No. 16 (being a supplemental to Special Assessment No. 6).

"It Is Further Ordered that the plaintiff and relator herein recover its costs to be taxed by the Clerk of this Court and have judgment entered thereof against the defendants herein, and that execution issue therefor."

There are certain settled rules of law that govern the instant case:

In People v. Palmer, 356 Ill. 563, the court said (p. 569): "A mandamus proceeding is an action at law and is governed by the same rules of pleading that are applicable to other actions at law. (Osborne v. Bradford, 346 Ill. 464; People v. Board of Review, 329 id. 388.) The petition performs the function of a declaration, and must state facts showing that the respondent is under a legal obligation to perform the act sought to be coerced, and every material fact to show such legal duty must be alleged. (Osborne v. Bradford, supra; People v. Blocki, 203 Ill. 363.) The answer should deny the facts alleged in the petition or confess and avoid

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them, averring specifically the facts excusing the conduct of the respondent. (People v. Lueders, 287 Ill. 107; Mayor and City Council of Roodhouse v. Briggs, 194 id. 435.)" (Italics ours.)

In Mayor of Roodhouse v. Briggs, 194 Ill. 435, the court said (p. 437): "A proceeding for mandamus is a suit at law, and if the respondent answers he must deny the facts alleged in the petition on which the claim of the relator is founded, or confess and avoid by setting up other facts showing that he is under no obligation to perform the act sought to be coerced. All facts properly set forth in the petition which are not denied by the respondent in express terms are admitted to be true, as in other pleadings at law. (Chicago and Alton Railroad Co. v. Suffern, 129 Ill. 274; People v. Crabb, 156 id. 155; 13 Ency. of Pl. & Pr. 734.) In this case the respondent answered and made no denial of any fact alleged in the petition, except the facts that petitioner was the owner in fee simple of all the land described in her petition, and that no part of said premises was laid out in town lots, - both of which were denied. The other allegations of the petition were therefore admitted." (Italics ours.)

In People v. Lueders, 287 Ill. 107, the court said (pp. 109, 110): "A proceeding for a writ of mandamus is an action at law, and the petition, answer and subsequent pleadings are governed by the same rules as apply to an ordinary action at law. (Silver v. People, 45 Ill. 224; Dement v. Rokker, 126 id. 174; Board of Supervisors v. People, 159 id. 242; People v. Board of Education, 236 id. 154.) The petition takes the place of the alternative writ at common law and is in the nature of a declaration. (City of Chicago v. People, 210 Ill. 84; People v. Pavey, 151 id. 101; People v. Busse, 247 id. 333.) An answer to the merits of a petition for a writ of mandamus waives a demurrer, and an issue at law as to the right of the petitioner for the relief prayed for on the facts stated in the petition cannot be raised by setting up in an answer facts designed to raise such an issue. (Chicago Great Western Railway Co. v. People, 179 Ill. 441.) A respondent may demur or answer, and if he answers



the answer must traverse by distinct and direct denial the facts alleged in the petition upon which the claim of the relator is founded, or by confession and avoidance set up other facts sufficient in law to defeat the claim. All the material facts alleged in the petition and not denied by the answer are admitted to be true. (Chicago and Alton Railroad Co. v. Suffern, 129 Ill. 274; People v. Crabb, 156 id. 155; People v. Commissioners of Cook County, 180 id. 160.)" (Italics ours.)

In Rothschild v. Village of Calumet Park, 350 Ill. 330, the court said (pp. 338, 339): "We have held that the proceeds of special assessments are trust funds for the payment of the bonds issued for the cost of the improvement. (Conway v. City of Chicago, 237 Ill. 128.) The theory of the statute is, that the bonds issued against each installment of the assessment, together with the interest on them, will be paid as the installment and the interest on it are collected. The installments are payable on January 2 of each year and the bonds will be due at a later date in the same year. The installments are the only source of payment of the bonds, and when they are collected by the municipality the money received becomes a trust fund for the payment of the bonds to the holders, without preference among them. If for any reason the full collection of an installment is not made the deficiency must fall upon the bondholders, and equity requires that the loss shall be borne ratably by each bondholder. Therefore, when the bonds of any year become due and the collection from the installment of that year is insufficient to pay them, the bondholders are entitled to the amount collected, and it is the duty of the trustee - the municipality - to pay upon each bond issued against the installment its share, pro rata, of that amount."

In Siefker v. City of Chicago Heights, 297 Ill. App. 113, it was held that the owner of a special assessment bond, which by its terms was to be paid out of money collected by special





assessment, was entitled to payment of money in hands of the city treasurer as a result of such assessment notwithstanding diversion of collections by former city treasurer to improper payment of other bond prior to maturity resulting in deficit in fund. The opinion of the court states (pp. 117, 118): "The wrongful action of the former city treasurer in diverting the collections, is not a matter which could legally affect the rights of this plaintiff. The City was a mere trustee for the collection of these funds, they being the proceeds of a special assessment, or trust fund, for the payment of the bonds issued before the collection of such assessment, and such proceeds of the collection of the special assessment were to have been used only in payment of such bonds. Rothschild v. Village of Calumet Park, 350 Ill. 330; People ex rel. Anderson v. Village of Bradley, 367 Ill. 301; Cook v. City of Staunton, 295 Ill. App. 111. As was said in the case of People ex rel. Anderson v. Village of Bradley, 367 Ill. 301, at page 307: 'The money collected by the village from the special assessment levied to pay the cost of the improvement constituted a trust fund available to those having legal claims for materials furnished, or labor performed, in the course of the construction of the sewer. The village could not lawfully appropriate any part of those funds to other corporate uses. The withdrawn funds are treated as still in the custody of the village for the purpose of paying the liability imposed by its contract for the improvement. To permit the village to say it no longer has the money, or is unable to pay, would be to place municipalities in a position to defeat the lawful claims of contractors who have, in good faith, fulfilled their undertakings for the construction of, or the furnishing of materials or labor for, local improvements. The law will not countenance the evasion by a village of its debt, by either its wilful or negligent failure to apply towards the discharge of that obligation funds collected by it for the specific purpose of meeting such demand. Conway v. City of Chicago, 237 Ill. 128; Rothschild v. Village of



Calumet Park, supra."

The following are the errors relied upon by respondents:

"The Court erred in ordering money paid to relator on bonds drawn against Special Assessment funds when no such amount of funds were on hand or available for such payment.

"The Court also erred in ordering funds paid pro-rata in Special 16 to an assignee of the contractor where it appears the contractor owning all the bonds of the issue had drawn down the face value of a part of his bonds without reference to pro-ration thereof.

"The Court erred in ordering the Village officials to personally pay the funds in question.

"The Court erred in assessing costs against the Village officials who were nominal defendants."

The respondents admit, as they must, that it was the duty of the Village "to pay upon each bond issued against the installment its share, pro rata, of that amount," but they state: "It appears that by an understanding between the contractor and the Village officials that was not done in this case. That may have been wrong but if it were the assignee of the contractor is in no position to complain. And if it were wrong, two wrongs do not make a right. The court should not do the second wrong;" that "the judgment order of the court is based upon the thought that a mandamus may be issued commanding payment of moneys owing and that should be on hand, instead of monies that are actually on hand available to comply with the writ." Respondents argue that "no mandamus writ should issue to pay money unless it be shown such funds are on hand or under control." The case cited in support of this contention, Board of Supervisors v. People, 222 Ill. 9, has no application, upon the facts, to the instant proceeding.

The installments that were provided for the payment of all of the bonds in question in the instant case did not go into

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collection until January 2, 1931, but on August 27, 1930, the Village caused to be issued a check in the sum of \$25,000 payable to George Elder; on December 6, 1930, the Village issued a check in the sum of \$1,000 payable to Elder; and on December 7, 1930, issued a third check in the sum of \$2,000 payable to Elder. All of the said amounts represented collections made by the Village from people who owned property against which Special Assessments Nos. 15 and 16 were levied. In return for said checks so issued Elder turned over to the Village twenty-eight \$1,000 bonds of the Special Assessment No. 16 issue and the Village retired said bonds. All of this was done without the approval or knowledge of the relator. Respondents introduced no evidence tending to rebut the evidence of relator that it was the bona fide holder of the bonds mentioned in the petition. The master found that relator was the owner of the bonds and the court sustained that finding. Elder seems to have been an agent of J. M. Donahue, who did the work and who received in payment all of the bonds issued in the two special assessments. The respondents contend that relator was an assignee of Donahue in the matter of the special assessment bonds it bought from him and it is therefore bound by the transactions between the Village and Elder in reference to the twenty-eight bonds in question, and they cite in support of this contention such cases as The Northern Trust Co. v. Village of Wilmette, 220 Ill. 417. There it appeared that special assessment bonds were issued to the contractor in payment of the work done under the public improvement, and the contractor sold certain of the bonds to the petitioners, who sought "a writ of mandamus to compel the municipality, out of its general funds, to re-construct a certain public improvement mentioned in the petition and to pay the improvement bonds held by appellants [petitioners]." The Supreme court states (p. 427): "The work was not done according to the contract by reason of the fraud or wrong of the contractor. He [the contractor] being at fault, it certainly would not be claimed that he could maintain a writ of mandamus to compel the village, at its



own expense, to remedy something for which he was directly responsible. If he should seek to do such a thing he would be immediately confronted with the fact that he was trying to take advantage of his own wrong. Under the authorities above cited the purchasers of these bonds, which were originally issued to the contractor, now occupy the same position which he occupied. The bonds were not negotiable. This fact was known to the purchasers. They cannot enforce any other or additional right than could the contractor. They are therefore liable for his fraud or wrong in failing to put in the improvement which the ordinance specified. Under this state of facts they had no right to a writ of mandamus, and the court committed no error in so holding." No such situation is present in the instant case. Here there was no fraud in the performance of the contract, but the Village committed a wrongful act in the distribution of the special assessment funds collected by it. The moneys collected were trust funds and the Village will not be permitted to evade the law governing the distribution of the special assessment funds collected by it. The funds that the Village should have on hand to meet its obligations to the petitioner are treated as still in the custody of the Village. As stated in Siefker v. City of Chicago Heights, supra (p. 118): "To permit the village to say it no longer has the money, or is unable to pay, would be to place municipalities in a position to defeat the lawful claims of contractors who have, in good faith, fulfilled their undertakings for the construction of, or the furnishing of materials or labor for, local improvements. The law will not countenance the evasion by a village of its debt, by either its wilful or negligent failure to apply towards the discharge of that obligation funds collected by it for the specific purpose of meeting such demand." As further stated in that opinion (p. 117): "The wrongful action of the former city treasurer in diverting the collections, is not a matter which could legally affect the rights of this plaintiff." A fortiori, the instant alleged defense cannot

own and those, to whom they are to be made, to be responsible. It is also to be noted that the fact that the bonds were not negotiable, which were often paid to the purchasers of these bonds, which were often paid to the contractor, not only in the same manner as the bonds, but also in the same manner as the bonds were not negotiable. This fact was known to the contractors. They cannot enforce any other or additional rights which could the contractor. They are therefore liable for the bond or wrong in failing to do so in the future and which the contractor specified. Under this action of the contractor they had no right to a right of mandamus, and the court decided no such right to be granted. Such action is present in the instant case. The bonds were not found in the performance of the contract, and the village committee a wrongful act in the distribution of the special assessment funds collected by it. The monies collected were not found and the Village will not be permitted to avoid the law governing the distribution of the special assessment funds collected by it. The funds that the Village should have retained to meet its obligations to the petitioners are not to be paid to the petitioners. As stated in *Shelby v. City of Chicago*, 111 Ill. 2d 123: "to permit the village to say it has no bond, it has the money, or the right to pay, would be to place mandamus in the hands of the petitioners the lawful claims of contractors who have, in the past, been paid for their undertakings for the construction of, or the furnishing of materials or labor for, local improvements. The law will not countenance the evasion by a village of its obligation to pay for its obligations or negligent failure to apply towards the payment of such obligation funds collected by it for the specific purpose of meeting such demand." As further stated in that opinion (111 Ill. 2d 123): "The wrongful action of the former city government in its failure to collect, as not a matter which could legally be set aside of this plaintiff." A fortiori, the instant plaintiff cannot



be considered, because it is not set up in the answer. Counsel for relator upon the hearing of the cause objected to the introduction of evidence bearing upon the instant defense upon the ground that it was not only incompetent and immaterial but that it had no tendency to support any defense interposed by the respondents in their answers. Relator's motion to strike all of the said testimony should have been allowed.

The respondents ~~also~~ contend that the fact that the Village lost special assessment funds in a bank failure should also be taken into consideration in determining whether the writ of mandamus should have issued. It is sufficient to say in answer to this contention that no such alleged defense was set up in the answer. The respondents also contend that it would be inequitable to order the Village to pay the moneys in question because it appears that the said moneys are not actually on hand to comply with the writ. Throughout their brief respondents ignore the important fact that the Village was a mere trustee in the collection of the special assessments and that it was bound, under the law, to pay upon each bond issued against the installment its share pro rata of the amount collected. The funds the Village should have on hand to meet the relator's demand are treated as still in the custody of the Village, and it would be highly inequitable to permit the Village to avoid a writ in the instant case by pleading, in effect, that it has not on hand the funds that rightfully belong to the relator because it illegally used the same. A number of years have passed since the Village became obligated to pay to relator its pro rata share of the special assessments in question that were collected by it. Even when the instant proceedings came on for hearing it did not offer to pay relator if given reasonable time. Instead it resorted to technical defenses. Here in this court it does not argue that the trial court should have given it reasonable time in which to make payment. Indeed, it does not concede that relator has an enforceable claim against the Village. The equities in the case are with relator, who has waited long enough



for the trustee to pay to the relator its pro rata share of the trust fund.

Respondents contend that "the judgment is open to the construction that the Village officials are personally liable for those amounts of money and their titles and interest are clouded thereby. That portion of the judgment order should be reversed." Respondents did not by demurrer nor answer attempt to be dismissed out of the proceedings. As was stated in People ex rel. Decker v. City of Park Ridge, 275 Ill. App. 97, 103 (opinion by Mr. Justice Wilson): " \* \* \* the mayor and city clerk, may have some active duty in connection with the distribution of the funds which might be necessary to complete relief. The City of Park Ridge acts through its officers and they have been made parties defendant." The judgment order merely commands the Village officials, as officials, to account and pay over to relator the moneys in question. There is no merit in the instant contention. Nor is there any merit in the contention of respondents that the judgment for costs assessed against the Village and the Village officials should be reversed as to the officials.

The judgment order of the Superior court of Cook county is affirmed.

JUDGMENT ORDER AFFIRMED.

Sullivan and Friend, JJ., concur.

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IRVING-AUSTIN BUILDING CORPORATION,  
a corporation, et al.,  
Appellees,

v.

VILLAGE HOMEBUILDERS, INC., a  
corporation, et al.,  
Appellants.

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APPEAL FROM CIRCUIT  
COURT OF COOK COUNTY.

33 2 I.A. 179<sup>2</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a decretal judgment that sustained the exceptions of plaintiffs to the master's report and enjoined defendants from installing a gasoline filling station at the northeast corner of Irving Park road and North McVicker avenue, Chicago.

The verified complaint alleges that plaintiff Irving-Austin Building Corporation owns and possesses certain real estate improved with a theatre building, located at the northwest corner of West Irving Park road and North Austin avenue, Chicago; that said real estate has a frontage of 135 feet on West Irving Park road and 207.72 feet on North Austin avenue; that plaintiff Patio Theatre Company for more than ten years has occupied and still occupies and uses said theatre building as a moving picture theatre; that the premises located at the northeast corner of West Irving Park road and North McVicker avenue (here follows legal description) are owned by defendant Village Homebuilders, Inc.; that on December 16, 1939, it leased said premises to defendant Phillips Petroleum Company for a gasoline filling station; that the boundaries of the last mentioned premises are within 200 feet of the nearest boundary of the lot or plot of ground so used as a theatre. The Complaint then sets up section 127-5 of the Municipal Code of Chicago. The complaint then alleges that defendants are threatening and preparing to construct a gasoline filling station and to install a tank or tanks for the storage of large quantities of gasoline on the said premises located at the

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corporate, of the  
Village Home Industries, Inc.

berikutnya tentu merupakan hal yang sangat penting dalam kehidupan

defendants in a meeting during which the defendant was

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Life in: 1919-1920 and 1921-1922

occurred and these birds were seen to enter the building and fly out again.

to remove the person and the person is going to be removed.

West Irving Park Road in North Ocklawton Avenue (see below)

Local residents (noted as being in the area of the village) are aware of the presence of the village.

line. The on October 1939, it passed in 1939 to

UNITED STATES DEPARTMENT OF JUSTICE

Station: that the Court view of the fact situation by which the

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known as used as a threat. The complaint then sets up a situation

158-2 of the Municipal Code of Chicago. The complaint then alleges

that standards are threatening and creating a constant state of anxiety

filling station and to install a pump or tanks for the storage of

LARGE quantities of gasoline and oil were found in the following locations:

northeast corner of West Irving Park road and North McVicker avenue; that in furtherance of said plan defendants have entered into a lease with each other providing that said corner shall be used as a gasoline filling station; that defendants have sought to procure or have procured an illegal permit from the bureau of fire prevention of the City of Chicago, in violation of said ordinance, to install said tanks for the storage of gasoline in connection with the operation of a public filling station on said corner; that the storage of gasoline on said premises and the establishment and use of a gasoline filling station thereon would greatly increase the fire hazards of said theatre building and depreciate the value thereof, and would also greatly injure and depreciate the business and diminish the profits of plaintiff Patio Theatre Company conducted in said building. Plaintiffs ask that defendants be enjoined from installing a gasoline filling station and any tank or tanks for the storage of gasoline or other inflammable liquids on said corner lot.

Defendant Phillips Petroleum Company filed an answer denying that it has attempted or is attempting to procure an illegal permit from the City of Chicago; denying that the storage of gasoline and the use of a gasoline filling station on the premises of defendant Village Homebuilders, Inc., would increase the fire hazard to the building of plaintiff Irving-Austin Building Corporation and depreciate its value; and denying that the use of a gasoline filling station on said premises would depreciate the business and diminish the profits of plaintiff Patio Theatre Company. The answer of defendant Village Homebuilders, Inc., is, in substance, the same as that of defendant Phillips Petroleum Company.

It appears from the evidence introduced before the master that the building owned by plaintiff Irving-Austin Building Corporation runs east and west on Irving Park road, from 6000 Irving Park road to 6012, and runs north and south on North Austin avenue





from 4000 North Austin avenue to 4018. The building is three stories high and contains a theatre, stores, offices and apartments. The theatre faces Irving Park road and has a capacity of 1,500 seats. The west boundary line of the building, in which the moving picture theatre is located, is within 200 feet of the east boundary line of the vacant property of defendant Village Homebuilders, Inc., the distance from the west line of the building to the line of the vacant lot being 131 feet. About 800 to 1,000 people attend the theatre on each week day and on Saturdays and Sundays the attendance is 2,500 to 3,000 for the two days. About 300 children go to the theatre on each week day, save Saturday, when 400 attend, and 1,500 attend on Sundays. Most of the people attending the theatre come from the west. It is a retail store neighborhood. The theatre patrons have been in the habit of parking their automobiles upon the vacant property of defendant Village Homebuilders, Inc.

Plaintiffs called as a witness Ernest H. Lyons, a real estate broker and appraiser in Chicago for forty years. He testified that he was familiar with the district in question and that he had twice examined the properties involved in the proceeding; that the intersection of Irving Park road and North Austin avenue is a "stop intersection." After describing the properties, the witness testified that the value of the Irving-Austin Building and the ground is \$250,000; that in his opinion the location of a gasoline filling station on the vacant lot of defendant Village Homebuilders, Inc., "would be detrimental and would reduce the cash market value of the theatre property \* \* \* about 10 per cent;" that a gasoline filling station on said defendant's property would reduce the amount of business done by the Patio Theatre Company because it "would have a tendency, in my opinion, to deter children from being sent to the theatre alone, or would add an impediment to their freedom and safety in getting to the theatre and would result



in a very moderate but a reduction of revenue to the theatre;" that "noise and fumes" incidental to the operation of a filling station "would be detrimental to the theatre;" that the theatre is equipped with a ventilating system by which air is pumped into the theatre "and if smoke or fumes or any odor was contiguous to the theatre, it would come in, in my opinion through that ventilating system and also there would be an increase I think in fire hazard. While it might not be directly reflected in an increase in insurance rates, there would be an increase in fire hazard and there would be an obstacle to the normal development, access to the property by these children. That about covers it." Upon cross-examination the witness stated that he was unable to cite any instance where a filling station located within 200 feet of a theatre had depreciated the value of the theatre or depreciated the business or attendance at the theatre; that the ventilating system of the theatre receives air through ducts on the roof, which is about thirty-five<sup>feet</sup>/~~from~~ the ground level, and that there are two or three ducts running north and south about in the center of the roof.

On behalf of defendants, Albert J. Schorsch and Louis L. Schorsch, officers of defendant Village Homebuilders, Inc., testified that William Michalopoulos, an officer in the Irving-Austin Building Corporation and Patio Theatre Corporation discussed with Albert J. Schorsch a proposed lease of defendant's property to plaintiffs, to be used for parking purposes by the patrons of the theatre, but that no lease was entered into because plaintiffs objected to a cancellation clause which Schorsch insisted should be inserted in the lease; that Michalopoulos requested permission to use defendant's property as a parking lot for the automobiles of the patrons of the theatre, and Schorsch granted the request.

Defendants called as a witness George R. Hanson, a realtor, builder and appraiser, who has had extensive experience in the matter of appraising property of all kinds. The witness testified that he was familiar with the district in question; that he had examined the

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property involved in the proceedings a few days before giving his testimony; that in his opinion the proposed gasoline filling station, if erected on the northeast corner of Irving Park road and North McVicker avenue, would not "appreciate or depreciate the value of the property;" that the proposed gasoline filling station on the vacant property would eliminate the possible use of the land for additional stores, thereby stabilizing the rent level of the present stores in plaintiff's building; that in his opinion "pedestrians would be perfectly safe walking to and from in front of the gasoline station;" that a gas filling station at the point in question would not in any manner affect the patronage of the theatre; that such a station would not be hazardous to children passing the station for the purpose of attending the theatre; that he based his opinion upon his observation of other theatres, such as the Gateway theatre, which has a large parking space to the west of the property; the Granada theatre, with a large parking space to the south of the property and a large filling station 150 feet south with entrances at the driveway of the parking space within twenty feet of the entrance of the theatre; the Lake theatre, which has a large parking space to the east of the property and a filling station within sixty feet of the property, with driveways over the sidewalk within sixty feet of the theatre; that he had served, for the assessors, as chairman of the valuation committee for the northwest side for the recent quadrennial land assessment values. Upon cross-examination the witness stated that he did not believe that the erection of a gas filling station on the ground would have any effect on the fire hazard of the theatre; that the erection of a gas filling station does not increase the fire hazard nor the insurance rate; that he does not believe that fumes from the gasoline of a station located upon the vacant property would affect the air in the theatre in the least; that he had examined the air-cooling system in the theatre in question; that it draws the air in from the roof; that in his opinion the air could not be con-



taminated at the height of thirty-five feet above the level of the ground upon which a filling station is standing; that he appraised the Belpark theatre, which had a gasoline filling station about 200 feet away from it.

At this point the attorneys stipulated that the insurance rates on the theatre building would not be increased by reason of the erection of the gas filling station.

Defendants called Fred J. Harlow, a combustion engineer employed by defendant Phillips Petroleum Company, who testified that he had been engaged in the combustion engineering field for thirty-nine years; that he was familiar with the natural action of gasoline fumes arising from vent pipes in a service station; that the gasoline fumes coming out of a vent pipe of a service station are immediately dissipated into the air; that he was familiar with the gas carbon monoxide that comes from the vent of an automobile. The witness was asked the following questions and made the following answers to them: "Q. In the present case, Mr. Harlow, it is proposed to locate a service station on the northeast corner of Irving Park and McVicker Avenue. There is a theatre located on the east end of that block on the north side of Irving Park Road. There is testimony in this case that the distance from the east line of the lot upon which the service station is proposed to be located to the center of the theatre is approximately 110 feet and that the vent system whereby fresh air is sucked into the theatre is in the center of this building running north and south. In your opinion, as a petroleum engineer, would carbon monoxide gas escaping from automobiles reach and enter the building located as I have just stated? A. It would not, that is, in any quantities. We all have to admit that the gas has a characteristic, that any gas that is exhausted we will say, from a vent pipe of an automobile, is there, but it is immediately diffused with air to the point where even analysis by very precise machines in the streets will not show you any appreciable amount of carbon monoxide. If this weren't true, if carbon monoxide





was so dangerous on Michigan Avenue or one of these streets in the evening, we would all be falling over like flies with cars one right behind the other going up the street. So, I should say that no appreciable carbon monoxide would enter that building. Q. Would there be any danger to the occupants of that theatre from what small amount of carbon monoxide might get into the theatre? A. Absolutely no. The average housewife probably has more carbon monoxide in her kitchen when she puts a cold teakettle of water on the gas burner for the first few minutes, because the chilling of the flame by the cold teakettle will probably produce more carbon monoxide than ever will be around that building. Q. In your opinion, under the same circumstances, would there be any danger to the occupants of the theatre from gasoline fumes -- No. Q. -- which might get into that ventilating system, in that way? A. Any gasoline -- if we would say that the gasoline fumes were concentrated to an extent they would be hazardous, -- they are about 2-1/2 to 3 times as heavy as air, but they are immediately dissipated. That is the definition of a gas. The gas will always occupy the space that it is put into; in other words, one cubic foot of carbon monoxide gas tries to occupy the universe when it is turned out of a pipe. In other words, the molecular action of the particles of gas immediately try to fill the whole universe, in other words, if we take one thimble full of gas and put it in this room, in a very few seconds the particles of that thimble full of gas would be in every corner. Q. And have you made such tests yourself as to gases? A. That is the rule of gases, the law of gases. They will always occupy the space they are put in, the same as the air occupies it." Upon cross-examination the witness testified that it is the tendency of gases to immediately spread around and that they are dissipated to some extent because they are mixed with the air; that the more fumes that are in the air the more the air is filled with gas; that a city has more gas fumes of various kinds than the country has; that the farther the gas spreads the weaker it gets,



and the closer you get to a place where they come from the more concentrated they are. H. T. Biddle, city manager of the Phillips Petroleum Company, testified that he estimated that 100 cars a day would enter the proposed filling station; that on Friday, August 16, 1940, between the hours of 2 p. m. and 6 p. m., and between the hours of 6:15 p. m. and 9 p. m., he checked the motorized traffic that crossed the intersection of Irving Park road and North Austin avenue; that 7,764 vehicles traveled east and west on Irving Park road, and 2,067 vehicles traveled north and south on North Austin avenue.

The master found, inter alia:

"Second. That the plaintiff Irving-Austin Building Corporation, a corporation, owns a certain parcel of land located upon the premises situated at the Northwest corner of West Irving Park Road and North Austin Avenue, in Chicago, being Nos. 6000 to 6012 W. Irving Park Road and Nos. 4002 to 4018 North Austin Avenue.

"Third. That the plaintiff, Patio Theatre Company, a corporation, has been for the past ten years, and is now operating a theatre upon the property of plaintiff, Irving-Austin Building Corporation.

"Fourth. That the defendant, Village Homebuilders, Inc., a corporation, owns the premises situated at the Northeast corner of West Irving Park Road and North McVickers Avenue, which premises are vacant.

"Fifth. That to the west of the premises of plaintiff, Irving-Austin Building Corporation, are three stores on two twenty-five foot lots, and immediately west of these stores lies the piece of vacant property of defendant, Village Homebuilders, Inc., a corporation.

"Sixth. That on or about December 16, 1939, defendant, Village Homebuilders, Inc., a corporation, executed a lease for its premises to defendant, Phillips Petroleum Company, for a gasoline filling station.



"Seventh. That the boundaries of the premises of Village Homebuilders, Inc., a corporation, are within 200 feet of the lot or plot of ground of plaintiff, Irving-Austin Building Corporation.

"Eighth. That there is now in full force and effect in the City of Chicago, an ordinance of said City, being Section 127-5 of the Municipal Code of Chicago as adopted August 30, 1939, which said section is in words as follows:

"127-5. No tank for the storage of flammable liquids shall be installed in any lot or plot of ground where any of the boundaries of any such lot or plot of ground are within two hundred feet of the nearest boundary of any lot or plot of ground used for a school, hospital, church or theater.

"No person shall locate, construct, or maintain any filling station in connection with which there is installed any tank for the storage of flammable liquids on any lot or plot of ground without first obtaining the written consents of the property owners representing the majority of the total frontage in feet of any lot or plot of ground lying wholly or in part within lines one hundred and fifty feet distant from and parallel to the boundaries of the lot or plot of ground upon which said tank is to be installed; provided, however, that for the purpose of this section only the frontage of any such lot or plot of ground or that part of the frontage of any part of such lot or plot of ground as comes within the one hundred and fifty foot limit herein prescribed shall be considered; and provided, further, that any and all petitions containing such consents of property owners shall be based on and contain the legal description of the property affected, and that, for the purposes of this section, whenever the lot or plot of ground in which such tank is to be installed is in any shape other than a rectangle the one hundred fifty foot limiting line aforementioned shall not exceed in distance one hundred and fifty feet from any point in the boundaries of such lot or plot of ground.

"These provisions shall not be applicable to the installa-



tion of a tank containing any of the oils referred to in Section 51-2 when such oils are to be used in connection with garages or manufacturing plants where such oils are incidental to the business conducted or oils used for fuel purposes, and when sold to customers of such garages or plants are dispensed from portable tanks or from pumps located inside of the premises not accessible directly from the street or from an open driveway.

"Except as otherwise permitted by chapters 51 and 129 of this code, storage of flammable liquids shall be outside of buildings.'

"Ninth. That filling stations and gasoline tanks in connection therewith have become necessary to city life and are not nuisances, per se.

"Tenth. That the storage of gasoline upon the premises of defendant, Village Homebuilders, Inc., a corporation, and the establishment and use of a gasoline station thereon would not increase the fire hazards of the theatre building above described.

"Eleventh. That the storage of gasoline upon the premises of defendant, Village Homebuilders, Inc., a corporation, and the establishment and use of a gasoline station thereon, would not depreciate the value of the building of plaintiff, Irving-Austin Building Corporation, nor would it injure or depreciate the business of plaintiff, Patio Theatre Company.

"Twelfth. That the plaintiffs would not suffer any special damage by virtue of the proposed installation of a gasoline station and any tanks for the storage of gasoline or other inflammable liquids upon the premises hereinabove described."

The master recommended that a decree be entered dismissing the complaint for want of equity. Thereafter certain objections filed by plaintiffs to the master's report were overruled.

Defendants contend that: "1. The court erred in sustaining plaintiffs' exceptions to the Master's report. 2. The court erred in overruling the Master's report that plaintiffs





would not suffer special damages. 3. \* \* \* in overruling Master's finding 'that filling stations and gasoline tanks in connection therewith have become necessary to city life and not nuisances, per se.' 4. \* \* \* in overruling the Master's finding 'that the establishment and use of a gasoline filling station thereon would not increase the fire hazard of the theatre building above described.' 5. \* \* \* in overruling Master's finding 'that the storage of gasoline upon the premises of defendant, Village Homebuilders, Inc., a corporation, and the establishment and use of a gasoline filling station thereon, would not depreciate the value of the building of plaintiff, Irving-Austin Building Corporation, nor would it injure or depreciate the business of plaintiff, Patio Theatre Company.' 6. \* \* \* in decreeing that a writ of injunction issue against defendants."

Defendants strenuously contend that under the pleadings, the evidence and the law plaintiffs failed to make out a prima facie case that a violation of the ordinance in question would work special and irreparable injury to them, and that the trial court erred in sustaining plaintiffs' exceptions to the master's report and in entering the decretal judgment; that even if it could be assumed that plaintiffs made out a prima facie case under the pleadings, the evidence, and the law, nevertheless, plaintiffs failed to prove by a preponderance of the evidence that they will suffer special or irreparable injury to their real estate or business. After a careful consideration of the pleadings, the evidence, and the law, we are satisfied that both contentions are meritorious.

The law is well established that the enforcement of city ordinances is not one of the functions of a court of chancery and that an injunction will not be issued to restrain a mere violation of a city ordinance; that the enforcement of an ordinance of any city, village or town organized under the law of this State is vested in the municipality enacting such ordinance. In Joseph v. Wieland Dairy Co., 297 Ill. 574, the court said (p. 579): "The rule is thoroughly established that equity will not entertain jurisdiction and issue an



injunction unless the complain<sup>ant</sup> shows that he will be injured if relief is not granted, and the allegations must be clear and distinct that substantial injury will be sustained. (Allott v. American Strawboard Co., 237 Ill. 55; Springer v. Walters, 139 id. 419.) A private citizen cannot call upon a court of equity to enjoin an injury threatened to purely public rights. (Springer v. Walters, *supra*; City of Chicago v. Union Building Ass'n, 102 Ill. 379.) So he cannot maintain an action at law for a public nuisance unless he has been personally injured, and in such case the special injury is the gist of the action, and unless it is alleged and proved there can be no recovery. (McDonald v. English, 85 Ill. 232.) A court of equity will not at the suit of an individual restrain the threatened violation of an ordinance regulating the erection of buildings where the injunction is sought merely for the enforcement of the ordinance and not because of special damage to the individual, but where it is shown that in addition to the violation of the ordinance the erection will work special and irreparable injury to the property of the individual he may obtain relief by injunction." (Italics ours.)

Filling stations are not nuisances per se. (Continental Ill. Bank & Trust Co. v. Standard Oil Co., 257 Ill. App. 425, 430; Mitchell v. Wengelewski, 259 Ill. App. 438.) The use of automobiles in the United States has become so general that filling stations are now public necessities and they are found in every city, town and hamlet, and on every highway. The ordinances of the City of Chicago regulating the erection and maintenance of filling stations are so stringent that the stations are neither a menace to the health of the community nor to property located near them. The evidence in the instant case shows that the erection of a filling station does not increase the insurance rates on buildings near it. If it increased the fire hazard, it is certain that the rates would be increased. Even in downtown Chicago filling stations are everywhere, even within large buildings. The evidence shows that there are



filling stations within 200 feet of several of the largest theatres in Chicago.

As to the charge that the proposed filling station would depreciate the value of the building, witness Lyons, testifying for plaintiffs, stated that the location of a gasoline filling station on the lot in question would reduce the cash market value of the theatre property about ten per cent. The witness was unable, however, to cite an instance where a filling station located within 200 feet of a theatre had depreciated the value of the theatre or diminished the business of or the attendance at the theatre, although it appears from the evidence that a filling station is located within 200 feet of a number of large theatres in Chicago and it is a matter of common knowledge that there are filling stations within 200 feet of several of the largest downtown theatres. Witness Hanson, testifying for defendants, stated that the proposed filling station would neither appreciate nor depreciate the value of plaintiff's building; that the proposed gasoline station would eliminate the possible use of defendant's land for additional stores, thereby stabilizing the rent level of the stores in plaintiff's building. The master, who saw the witnesses and heard the testimony, found that the establishment and use of the proposed gasoline station would not depreciate the value of the building of plaintiff Irving-Austin Building Corporation.

As to the charge that the filling station would "greatly injure and depreciate the business of the plaintiff Patio Theatre Company conducted in said building and diminish its profits": The only evidence offered by plaintiffs to support this charge is that of the witness Lyons, who testified that the proposed gas filling station would reduce the amount of business done by the Patio Theatre Company because it "would have a tendency, in my opinion, to deter children from being sent to the theatre alone, or would add an impediment to their freedom and safety in getting to the theatre and would result in a very moderate but a reduction of revenue to the theatre." Defendants offered evidence in rebuttal

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of this testimony. In our opinion the argument that the proposed filling station, with an expectancy of serving a hundred automobiles every twenty-four hours, would have a tendency to prevent children living west of the station from going to the theatre is an idle one. Children who live east and south of the theatre are confronted with cars when going to the theatre. It is significant that plaintiffs were perfectly willing to lease the vacant lot of defendant for a parking space for the use of the patrons of the theatre. As a matter of fact, no one passing along upon a sidewalk is embarrassed by the fact that a filling station is located near the sidewalk. Where <sup>a</sup>filling station is located upon a corner it is a common custom for people to make a short cut across the filling station lot.

Plaintiffs claim that smoke, fumes and odors incidental to the operation of a filling station "would be detrimental to the theatre." The sole witness plaintiffs called in support of this claim was Mr. Lyons, who did not claim to have any special knowledge as to the action of gasoline fumes, and his testimony on the subject is of the most general character. Upon cross-examination he admitted that he was unable to cite any instance where a filling station located within 200 feet of a theatre had depreciated the value or business of the theatre or the attendance at the theatre. Hanson, the real estate expert and appraiser, called by defendants, testified that the fumes from the gasoline of a proposed station located upon the vacant property in question would not contaminate the air drawn into the theatre by the air-conditioning system, and he gave his reasons for so concluding. But in addition to the testimony of Hanson defendants called Fred J. Harlow, an expert upon the subject of gas fumes, who testified that no appreciable carbon monoxide that might come from the vent pipe of the proposed filling station or the vent pipe of an automobile at the station would enter the theatre building through the air-conditioning system. It is clear that plaintiffs did not prove by a preponderance of the evidence





that the air in the theatre proper would be contaminated if a filling station with an expectancy of one hundred cars every twenty-four hours were erected upon the vacant lot, and it is hard to take plaintiffs' contention seriously in view of the fact that thousands of automobiles pass in front and to the side of the theatre daily, and that every minute or two automobiles are compelled to stop in front of and at the side of the theatre because of the stop light signal at the intersection of Irving Park road and North Austin avenue. Because of this condition the theatre ~~proper~~ already has noises, fumes and odors infinitely greater than could possibly arise by reason of the proposed filling station. Moreover, as we have heretofore stated, plaintiffs desired to lease defendant's vacant ground as a parking place for the autos of their patrons.

Plaintiffs contend that "the theatre was among those designated by the ordinance [first paragraph of Section 127-5 of the Municipal Code of Chicago] as having such an interest as to require frontage consents," and that a violation of such provision of the ordinance is such a special damage to plaintiffs as warrants relief by injunction. It is sufficient to say as to this afterthought contention that plaintiffs' complaint contains no allegation regarding frontage consents and no such issue figured in the trial of the cause. Plaintiffs argue that their "special and particular damage resulting from the proposed location of the gas tanks is shown by the clear purpose of the ordinance to protect the theatre from such damage," and that "it is well established that a violation of rights so established by ordinance is such a special damage to the person injured as to warrant relief by injunction." Plaintiffs' argument proceeds upon the theory that when they proved the ordinance and the proposed violation of the same by defendants the law presumes that they will suffer special damages if the filling station is established. The law that governs this case is announced in Joseph V. Wieland Dairy Co., supra, wherein the court plainly states that to sustain a complaint to restrain the alleged threatened violation of an ordinance, the plain-

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plaintiffs... nated by the... municipal code of... frontage... ordinance... by injunction... tion that... frontage... case. The... resulting from the proposed... clear purpose of the... and that... lished by ordinance... to warrant... the... violation of the... after special... law that governs... wherein the court... restrain the... restrain the...

tiff must allege and prove that such violation will work special and irreparable injury to him. Furthermore, the court states (p. 579): "\* \* \* the special injury is the gist of the action, and unless it is alleged and proved there can be no recovery. (McDonald v. English, 85 Ill. 232.)" In Klumpp v. Rhoads, 362 Ill. 412, the court said (p. 416): "A private citizen cannot maintain an action to restrain a public nuisance unless he is particularly and specially injured in a manner distinct from the injury suffered by him in common with the public at large. Joseph v. Wieland Dairy Co., 297 Ill. 574; Hoyt v. McLaughlin, 250 id. 442." The rule stated in Joseph v. Wieland Dairy Co. has never been changed nor modified, to our knowledge, by our Supreme court. The several cases cited by plaintiffs in support of their position, when carefully analyzed, do not change nor modify the law stated in Joseph v. Wieland Dairy Co.

After a careful consideration of this appeal we have reached the conclusion that the chancellor erred in sustaining the exceptions to the master's report. We cannot help but feel that if the proposed filling station would constitute a menace to the health or comfort of the theatre patrons, or if it would work a serious injury to the business or property of plaintiffs, their able counsel would have established such facts by satisfactory evidence. They have not done so.

The decretal judgment of the Circuit court of Cook county is reversed and the cause is remanded with directions to the trial court to dismiss plaintiffs' complaint for want of equity.

DECRETAL JUDGMENT REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS TO DISMISS  
COMPLAINT FOR WANT OF EQUITY.

Sullivan and Friend, JJ., concur.



41650

HANNAH E. DEWES, by ROGER  
E. APPELYARD, her Conservator,  
Appellee,

v.

G. EARL GRINDLE and ANNA L.  
GRINDLE,  
Appellants.

20A  
APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

312 I.A. 180

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On October 17, 1940, Anna L. Grindle and G. Earl Grindle, defendants in the above entitled cause, filed a motion in the nature of a writ of audita querela. After certain proceedings in the trial court the following order was entered on November 25, 1940: "The motion of defendants herein filed October 16, 1940 supported by affidavits and the reply of plaintiff thereto filed, both being fully considered, plaintiff's motion to strike said motion of defendants is hereby allowed and same said motion of defendants is denied." Defendants appeal from that order.

The following is defendants' verified motion:

"Now come Anna L. Grindle and G. Earl Grindle, defendants in the above entitled cause, \* \* \* and move the Court to satisfy the judgment entered in the above entitled cause on June 6, 1932, by operation of law, to-wit:

"That on December 1, 1933, Anna L. Grindle and G. Earl Grindle filed their voluntary petitions in bankruptcy; that on April 23, 1934 the petitioners and the defendants were discharged in bankruptcy under an act of Congress and that the supposed cause of action was not in any respect of any such debts or debt as are or is by the said act excepted from the operation of a discharge in bankruptcy. That the said debt aforementioned was duly scheduled and notice was duly given in accordance with the Statute in such cases made and provided. That the said Anna L. Grindle and G. Earl Grindle who are the defendants in this cause are the same persons who were the petitioners in bankruptcy in the District Court of the

LAURENCE E. BROWN, JR.  
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United States, Northern District of Illinois, Eastern Division, causes #54547 and \$54548.

"That an execution was issued on said judgment on the 6th day of September, 1939, Sheriff's number 1978. That the said execution was inequitable in that it subjected the defendants to embarrassment and was made the basis of a Creditor's Bill despite the fact that said Anna L. Grindle and G. Earl Grindle were discharged in bankruptcy from the said claim.

"Wherefore these defendants move the Court to declare the said judgment of June 6, 1932 as being satisfied by operation of law; that it recall and quash the said execution entered in the above entitled cause and declare the same null and void and to hold for naught any rights which may have accrued by virtue of the said issuance and to grant to the said defendants a perpetual restraining order against any action whatsoever looking toward the collection of the judgment entered in the above entitled cause as of June 6, 1932."

Plaintiff filed a ~~motion~~ to strike the aforesaid motion, which avers, inter alia, that the motion of defendants does not present any legal ground upon which the relief as requested therein could be granted, because the discharge in bankruptcy therein referred to did not and does not release the defendants in law from the decree entered against them on June 6, 1932, for the sum of \$33,600.62 and costs of suit, because "(a) The decree was a liability for obtaining the property of the Plaintiff by false pretenses or false representations, and (b) in addition, was created by the fraud of the defendants while acting in a fiduciary capacity toward the plaintiff, and therefore, was a liability not dischargeable in bankruptcy." Defendants treated plaintiff's motion as an answer to their motion and filed a reply to it, which states: "First: (a) That the decree and judgment were based upon a Stipulation of the parties which was in fact an accord and satisfaction; that one of the conditions of the stipulation was the entry of





a judgment for Thirty three Thousand Six Hundred Dollars and sixty-two cents and that subsequently this judgment was discharged in bankruptcy as set forth in the defendants' Motion. (b) That the alleged fraud on the part of the defendants was not created while acting in a fiduciary capacity and was therefore a liability dischargeable in bankruptcy. As to the Second, these defendants say that a discharge in bankruptcy suspends the right of action on a judgment but does not destroy the judgment creditor's right to revive his judgment. Further, that the plaintiff is entitled to a revival of judgment but is not entitled to an execution looking toward the collection of the said judgment, for that the judgment is dischargeable in bankruptcy."

Upon the hearing of defendants' motion before the trial court the parties proceeded to trial upon the assumption that an issue of fact had been made by the pleadings. Defendants introduced a certificate of the clerk of the District Court of the United States of America for the Northern District of Illinois, Eastern Division, certifying that Anna L. Grindle was discharged in bankruptcy on April 23, 1934; that on that date she had been duly adjudged a bankrupt and discharged from all duties and claims which existed on December 1, 1933, "excepting such debts as are by law exempted from the operation of a discharge in bankruptcy." (Italics ours.) A like certificate was introduced on behalf of defendant G. Earl Grindle. The parties orally stipulated in this court that plaintiff did not appear in the bankruptcy proceedings. From a record of the proceedings before the trial court in the instant case we find that on May 20, 1932, Judge Burke entered an interlocutory decree in the above cause, in which the report of Master in Chancery Doyle, to whom the cause had been referred, was confirmed. The decree found that in September, 1927, plaintiff, Hannah E. Dewes, was the owner of the following property: Two parcels of land worth approximately \$210,000, four mortgage notes



aggregating in amount \$60,000, first mortgages aggregating in amount \$11,500, a building lot, some cash, and certain cemetery stock; that she was then forty-seven years old; that she was stupid, vacillating, reticent, wavering, helpless, mentally incompetent, entirely ignorant of business, and possessing no business sense or judgment; that defendant Grindle was untruthful, deceitful, shrewd, confident, ruthless, bold, persistent, resourceful, and a conniver; that he was possessed of great salesmanship ability; that in October, 1927, shortly after he became acquainted with plaintiff and after he bribed her neighbor and adviser they persuaded plaintiff to agree to pay \$23,000 for a brick bungalow which Grindle was to build on her lot and which he later admitted was worth only \$13,000; that shortly thereafter plaintiff's adviser and Grindle persuaded her to permit the latter to collect the \$60,000 mortgage and after he and her adviser had been paid \$1,000 by the owner of the property for their efforts in his behalf Grindle and plaintiff's adviser persuaded her to compromise the mortgage obligation for \$40,000; that Grindle took in payment on the said building contract one of the \$15,000 notes of the \$60,000 mortgage and after plaintiff had been paid the compromise amount Grindle coerced plaintiff into paying him the full \$15,000; that he also persuaded her to pay him the \$8,000 balance due on the contract three years before it was due and long before the building was completed; that in April, 1928, he further persuaded her to give him \$5,000, and in May, 1928, he persuaded her to give him an additional \$2,000; that in June, 1928, he persuaded her to sell him part of her land, worth \$120,000, for \$100,000, and that he gave her in payment two equities worth less than \$12,000

000,510

and his unsecured note for \$88,000, due in ten years; that in July, 1928, he caused her to convey to him and Anna L. Grindle, his wife, as joint tenants, her remaining land, worth \$90,000, and to turn over to him first mortgages worth \$11,500 and some cemetery stock, and also persuaded her to cancel all of his obligations to her, viz., the payments of \$5,000 and \$2,000, respectively, and his note for \$88,000, and to reconvey to him the two equities which had been conveyed to her; that as a result he became possessed of all her property except the bungalow and some cash, and that he gave her in return only a writing, prepared and executed by himself, in which he stated that he would, for himself, his heirs, executors, administrators or assigns, pay to plaintiff the sum of \$500 per month during her entire life. The decree further found:

"\* \* \* that finally Grindle at all times dominated and controlled and influenced her and that she was mentally incompetent to understand the ruinous acts she was performing for the benefit of Grindle and his wife, and also was so mentally deficient so far as business dealings were concerned that she did not understand any of the things she did and that her judgment was so unsound that none of her transactions with Grindle were acts of sound judgment; that she reposed complete and unreasoning confidence in Grindle and obeyed him even after she had been informed of the true nature of his conduct toward her, and that Grindle took from her without consideration all of her property described in the amended bill; and under the representation that he was acting as her agent and advisor in whose pretended fidelity she could safely entrust her interests and her fortune, and that in all the circumstances he was at least her agent ex maleficio.



"That said Grindle did not show any reason or justification or explanation to even indicate that such transactions were fair;  
\* \* \*

"That the so-called annuity agreement is a sham and is unconscionable. \* \* \* That finally the so-called annuity agreement was merely an unsecured declaration that Grindle would pay and was a failure of consideration for the property for which it was given; that it amounts to nothing but the declaration and not the binding promise of Grindle, who on every prior transaction had overreached and deceived Hannah Dewes, and that even if he had intended to and did pay such annuity it would have been an unconscionable transaction by reason of its unfairness in the circumstances; that said annuity agreement is marked 'Not Negotiable' evidently for the purpose of preventing it from falling into other hands, and for the purpose of thus keeping it secret; and further because Grindle could always persuade, dominate and control Hannah Dewes, but could not expect to impose upon any normally intelligent person to whom she might negotiate or offer to negotiate her so-called rights to an annuity.  
\* \* \*

"(a) That in the circumstances there was a fiduciary relationship at all times between Hannah E. Dewes and defendant G. Earl Grindle, and later Mrs. Anna Grindle; that the first transaction was made possible by the conduct of Grindle in secretly obtaining Wolter as his agent to introduce Hannah Dewes to Grindle and to forward the bungalow deal, and this made Grindle the agent of Hannah E. Dewes and in all subsequent transactions Grindle was her agent; that this fiduciary and agency relationship continued to the end, Grindle acting as agent, advisor and pretended lawyer and friend in drawing the will and documents, etc., and in such agency and fiduciary relationship the burden was on defendants to show the transactions were fair; that they did not so show; that the evidence is overwhelmingly to the contrary.

"(b) That even if there were no fiduciary or agency re-





lationship, the circumstances show undue influence, domination and control by G. Earl Grindle over weak, inexperienced, unintelligent and helpless Hannah E. Dewes; that she was incapable of understanding the various transactions and that Grindle had an undue influence over her, which was exerted in business transactions to his benefit and her loss; that in such case the burden is on defendant to show that such influence was not abused; that defendant has not so shown; that the evidence is overwhelmingly to the contrary and that out of such transactions Hannah E. Dewes by stages gave her fortune to defendant upon documents lacking in any consideration or at least wholly inadequate consideration.

"(c) That each of the narrated transactions was important to Hannah E. Dewes, and the last one, the most important in her life; that any normal, reasonable person capable of understanding same would have given these serious consideration and received counsel from friends, relatives or legal advisors, but Hannah E. Dewes took none of these ordinary precautions, but entered blindly and alone into the various transactions with G. Earl Grindle; that this influence of said Grindle, or this subservience she had to him, made it his duty not to overreach or defraud her or deal unfairly with her; that, nevertheless, each transaction and particularly the last transaction of the annuity agreement was of such character that no rational person comprehending the nature thereof would have done as Hannah E. Dewes did, and no fair or conscionable man would have permitted her to do as Grindle permitted her to do, even if he had not actually persuaded her into these disastrous acts; that the unfairness thereof accompanies each transaction and increases as the transactions increase, and finally culminates in what cannot be denied, i.e., that G. Earl Grindle and Anna Grindle were acquiring a great fortune while Hannah E. Dewes was losing hers."

The decree orders that the deeds from plaintiff to defendants and the certificates of title shall be cancelled and the title to the lands reestablished and confirmed in plaintiff; that the



cause <sup>be</sup> referred to the master in chancery to determine the time when the moneys and securities had been turned over to the defendant, and the amounts of the same; and to ascertain the excess over its fair, cash, market value that plaintiff had paid for the bungalow, and that the fees of the master in chancery, \$2,926.60, be taxed as costs against defendants. On May 31, 1932, plaintiff and defendants, by their respective attorneys, entered into the following stipulation:

"It is hereby stipulated and agreed by and between the parties to the above entitled cause by their respective counsel,

"1. That the report of Master in Chancery, William A. Doyle, may be at once filed in the office of the Clerk of the Circuit Court of Cook County, Illinois, and may be confirmed by the Court, the right of the defendants to object and except thereto being hereby expressly waived.

"2. That the Court may enter a decree in accordance with the findings of said report and recommendations of the Master in Chancery.

"3. That the Court may in its decree find and order the following account between the complainant and the defendants:

"Due from the defendants, G. Earl Grindle and Anna L. Grindle to Hannah E. Dewes, complainant:

"To cash fraudulently obtained by G. Earl Grindle and Anna L. Grindle, from the complainant under building contract dated October 8, 1927.....\$10,000.00

"To interest thereon from February 1, 1928..... 2,083.33

"To cash fraudulently obtained by the defendants, G. Earl Grindle and Anna L. Grindle from the complainant as a loan..... 5,000.00

"To interest thereon from April 16, 1928..... 989.59

"To cash fraudulently obtained by G. Earl Grindle and Anna L. Grindle from the complainant as a loan..... 2,000.00

"To interest thereon from May 9, 1928..... 389.44

"To cash wrongfully obtained by G. Earl Grindle and Anna L. Grindle from the complainant, being the value of certain mortgage securities, the property of the complainant.....\$11,500.00

1. The first part of the document is a list of names and addresses, which are arranged in a columnar fashion. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list includes names such as "John Doe", "Jane Smith", and "Robert Johnson", along with their respective addresses.

2. The second part of the document is a series of numbered entries, each followed by a description of a property or item. The numbers are written in a cursive script, and the descriptions are written in a more formal, printed style. The entries include descriptions of land, buildings, and other property, along with their respective values and owners.

3. The third part of the document is a list of names and addresses, which are arranged in a columnar fashion. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list includes names such as "John Doe", "Jane Smith", and "Robert Johnson", along with their respective addresses.

4. The fourth part of the document is a series of numbered entries, each followed by a description of a property or item. The numbers are written in a cursive script, and the descriptions are written in a more formal, printed style. The entries include descriptions of land, buildings, and other property, along with their respective values and owners.

5. The fifth part of the document is a list of names and addresses, which are arranged in a columnar fashion. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list includes names such as "John Doe", "Jane Smith", and "Robert Johnson", along with their respective addresses.

6. The sixth part of the document is a series of numbered entries, each followed by a description of a property or item. The numbers are written in a cursive script, and the descriptions are written in a more formal, printed style. The entries include descriptions of land, buildings, and other property, along with their respective values and owners.

7. The seventh part of the document is a list of names and addresses, which are arranged in a columnar fashion. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list includes names such as "John Doe", "Jane Smith", and "Robert Johnson", along with their respective addresses.

8. The eighth part of the document is a series of numbered entries, each followed by a description of a property or item. The numbers are written in a cursive script, and the descriptions are written in a more formal, printed style. The entries include descriptions of land, buildings, and other property, along with their respective values and owners.

9. The ninth part of the document is a list of names and addresses, which are arranged in a columnar fashion. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list includes names such as "John Doe", "Jane Smith", and "Robert Johnson", along with their respective addresses.

10. The tenth part of the document is a series of numbered entries, each followed by a description of a property or item. The numbers are written in a cursive script, and the descriptions are written in a more formal, printed style. The entries include descriptions of land, buildings, and other property, along with their respective values and owners.

"To interest thereon from July 6, 1928.....\$ 2,148.26

\$34,110.62

"Credit—By cash paid to Hannah E. Dewes..... 510.00

"Total.....\$33,600.62

"That there is due from the defendants, G. Earl Grindle and Anna L. Grindle to the complainant the sum of Thirty-three Thousand Six Hundred and 62/100 Dollars and judgment of the court in said decree may be entered for said amount and the costs of the suit.

"4. That the defendants will herewith deliver to the complainant the Torrens Certificates of Title affecting the premises described in the bill of complaint and the deeds conveying said premises by the complainant to the defendants.

"In consideration of the execution of this stipulation the complainant, notwithstanding the findings of said report and of the provisions of any decree that may be entered herein, does hereby waive any right to have issued or enforced under the decree to be entered pursuant to said report, any writ of execution against the bodies of the defendants, G. Earl Grindle and Anna L. Grindle, or either of them, also waiving any right to the issuance of any writ of capias ad satisfaciendum, and such waiver shall be made a part of the finding and order of the Court in the said decree.

"Dated: May 31st, A. D. 1932.

"Edwin D. Lawlor,  
Solicitor for the Complainant.

"Rose & Symmes,  
Solicitors for Defendants."

On June 6, 1932, Judge Burke entered a final decree in this cause. It is a very lengthy one and for the purposes of this appeal it is sufficient to state that it contains all of the findings of the prior decree. It recites the stipulation of the parties and then finds that the deeds of conveyance had been fraudulently obtained from plaintiff, declared them null and void, and ordered

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that certificates of title which had been issued by the registrar of titles of Cook county to defendant be declared null and void and cancelled. The decree approves and confirms the report of Master in Chancery Doyle. It concludes as follows: "It is therefore ordered, adjudged and decreed that the complainant, Hannah E. Dewes, do have and recover from the defendants, G. Earl Grindle and Anna L. Grindle, under and by virtue of the findings of this decree, the sum of Thirty Three Thousand Six Hundred and 62/100 Dollars \$33,600.62, together with the costs of this suit, including the fees and costs of William A. Doyle, Master in Chancery, which are hereby fixed at the sum of Two Thousand Four Hundred Twenty-Six and 60/100 \$2,426.60, and that execution may issue therefore, provided, however, that for good cause shown to the Court, and by stipulation between the parties, no writ of execution against the bodies of the defendants, G. Earl Grindle and Anna L. Grindle, or either of them, or any writ of *capias ad. satisfaciendum* issue under this decree." (Italics ours.) The decree bears upon its face the following: "APPROVED: WILLIAM A. DOYLE Master in Chancery ROSE AND SYMMES Sol. for defts. EDWIN D. LAWLOR Sol. for Compl."

Defendants contend that "the judgment or decree of June 6, 1932, is the result of an accord and satisfaction by the parties;" that "the judgment or decree is based on an accord and satisfaction by the parties, and as such is dischargeable in bankruptcy," and they argue that "there was and is an accord and satisfaction in the case at bar; and that the effect of the accord and satisfaction was a merger of the original claims and that a judgment was entered on compromise agreement which was sanctioned by the Court, which made final the legal and expressed stipulation of the parties. That such a judgment as per stipulation was a judgment against the property only, of the defendants, and that such judgment was dischargeable in bankruptcy; \* \* \* that the judgment in the case at bar is an ordinary money judgment based upon the stipulation and agreement of the parties, and that the ordering part of the decree of June 6,





1932, makes no finding of fact which would form the basis of a decree based on fraud, but on the other hand, expressly orders that no execution shall issue against the bodies of the defendant debtors." Throughout their brief defendants persist in stating that the stipulation of the parties constituted an accord and satisfaction of plaintiff's right to a judgment based upon fraud, and that the decree merely carried out the stipulation. They concede that they did not deliver to plaintiff the Torrens certificates of title and the deeds that conveyed the premises to defendants, that they did not pay the amount of the judgment, \$33,600.62, and that the bankruptcy proceedings were brought to wipe out the judgment.

Accord and satisfaction requires a full satisfaction of the accord, but defendants contend that the entry of the judgment for \$33,600.62 constituted, in itself, a full satisfaction of plaintiff's claims that were based upon fraud. We cannot agree with ~~this~~ contention, nor can we agree with defendants' contention that the stipulation of the parties provided that there should be "a judgment against the property only, of the defendants," and that the judgment "is an ordinary money judgment based upon the stipulation and agreement of the parties." The decree entered on May 20, 1932, and the findings therein by Judge Burke, were based upon the report of Master in Chancery Doyle. If the parties intended by the stipulation that there should be only an ordinary money judgment entered in the decree of June 6, 1932, why did they provide in the stipulation that the report of Master Doyle "may be confirmed by the Court," and "that the Court may enter a decree in accordance with the findings of said report and recommendations of the Master in Chancery?" Why did the stipulation recite that the \$10,000 cash item was "fraudulently obtained by G. Earl Grindle and Anna L. Grindle, from the complainant;" that the \$5,000 cash item was "fraudulently obtained by the defendants, G. Earl Grindle and Anna



L. Grindle from the complainant as a loan;" that the \$11,500 cash item was "wrongfully obtained" by defendants from plaintiff; and why did the stipulation contain the provision that "the complainant, notwithstanding the findings of said report and of the provisions of any decree that may be entered herein, does hereby waive any right to have issued or enforced under the decree to be entered pursuant to said report, any writ of execution against the bodies of the defendants," etc.? (Italics ours.) If the judgment order to be entered in the decree was intended by the stipulation to be an ordinary money judgment plaintiff would have no right to a writ of execution against the bodies of defendants and there would be no necessity for the waiver provision. It is clear that the able and experienced trial judge who entered the interlocutory decree of May 20, 1932, also the decree of June 6, 1932, understood from the stipulation that a fraud judgment was to be entered, and in accordance with the stipulation he approved and confirmed the report of Master Doyle, and the findings in the decree as to fraudulent conduct of defendants were based upon the master's report. It would unduly lengthen this opinion to recite the many findings in the decree of June 6 to the effect that defendants obtained from plaintiff money and property by false pretenses and representations and that the deeds from plaintiff to defendants were obtained by fraud. The decree finds that there was a fiduciary relationship at all times between plaintiff and defendants and that, therefore, the burden was upon defendants to show that the transactions were fair; that they did not so <sup>but that,</sup> show, on the contrary, the evidence overwhelmingly proved that the transactions were not fair. The decree also finds that defendant Anna L. Grindle aided her husband in the perpetration of the various wrongs against plaintiff. If the judgment in the instant case was intended as merely a judgment against the property of defendants, as they now contend, why did Judge Burke enter the kind of decree that he did? A fortiori, why did defendants, through their able counsel, approve the decree? The position now taken by defendants



is the result of an afterthought. They argue that the waiver by plaintiff of the right to have issued or enforced any writ of execution against the bodies of the defendants, strongly supports their contention that the judgment is an ordinary money judgment. We find no merit in this contention. A writ against the bodies of the defendants is a right that a plaintiff in a proper case may exercise or not, as he sees fit. The waiver of that right by plaintiff did not in any way change the character of the decree that was entered.

We hold that the judgments in the bankruptcy court did not discharge the defendants from the decretal judgment entered against them on June 6, 1932, and if we are right in so holding it follows that there is no merit in defendants' motion in the nature of a writ of audita querela. It would be a serious reflection upon justice if defendants, in view of their dishonest and fraudulent conduct toward the unfortunate plaintiff, were allowed to prevail in the instant proceedings. In explaining why they consented to the provision in the stipulation that plaintiff waived the right to have issued or enforced any writ of execution against the bodies of defendants, plaintiff's counsel state that the cost of the litigation (the master's fee alone amounted to \$2,960.60) was taking what little defendants left to the demented plaintiff, and that it was for that reason alone that they consented to the waiver in the stipulation; that "apparently the defendants have forgotten their grave fears of incarceration for their misconduct and their humbleness as expressed in their stipulation, and have now assumed an unbecoming boldness," and have the effrontery to ask the courts to relieve them from paying anything to plaintiff.

On June 10, 1941, defendants filed a motion in this court for leave to file a certified copy of a certain order entered by Judge Fisher on May 29, 1941. The motion was reserved to the



hearing of the cause. After the motion was made counsel for both parties agreed that the said order was no longer material to a determination of the issues upon this appeal. The motion, therefore, will be denied.

The judgment order of the Circuit court of Cook county entered November 25, 1940, is affirmed.

JUDGMENT ORDER ENTERED  
NOVEMBER 25, 1940, AFFIRMED.

Sullivan and Friend, JJ., concur.

$$-\frac{1}{2} \frac{d^2}{dt^2} \left( \frac{1}{\rho} \right) = \frac{1}{2} \frac{d^2}{dt^2} \left( \frac{1}{\rho} \right)$$

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41724

GINA GRANLIE and LILLIAN  
GRANLIE,

Appellees,

v.

LADISLAV VALHA,

Appellant.

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

312 I.A. 181

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs sued to recover damages for personal injuries sustained when a certain automobile in which they were sitting was struck by an automobile driven by defendant. A jury returned a verdict finding defendant guilty and assessing Gina Granlie's damages in the sum of \$600 and Lillian Granlie's damages in the sum of \$50. The jury answered "Yes" to the following special interrogatory submitted to them: "Did the defendant, Ladislav Valha, wilfully and wantonly and with a conscious disregard for the rights of others operate his automobile on January 30, 1938, so that he directly injured the plaintiffs, Gina Granlie and Lillian Granlie?" A motion for a new trial was overruled. Thereupon the court entered the following judgments: "Therefore it is considered by the court that the plaintiff, Gina Granlie, do have and recover of and from the defendant, Ladislav Valha, her said damages of Six Hundred Dollars in form as aforesaid by the jury assessed. It is further considered by the court that the plaintiff Lillian Granlie, do have and recover of and from the defendant, Ladislav Valha, her said damages of Fifty Dollars in form as aforesaid by the jury assessed together with their costs and charges in this behalf expended and have execution therefor." It will be noticed that the judgments did not contain a finding that malice was the gist of the action, and that, therefore, no writ of capias ad satisfaciendum could be issued in the cause. (See Peiffer v. French, 376 Ill. 376.) Whether the trial court omitted a finding in the judgment that malice was the gist of the action inadvertently or intentionally does not appear.



Certain facts in the case are clear and undisputed. Gina Granlie, plaintiff, lived at 2243 Washington boulevard. Her son Harold is the husband of Lillian Granlie, plaintiff. Washington boulevard is a wide thoroughfare that runs east and west. Only westbound traffic is allowed upon that section of the boulevard. On January 30, 1938, about 3:30 a. m., Harold Granlie parked his car in front of his mother's home, on the south side of the boulevard. The two plaintiffs were with him in the car. There was a car parked five or six feet behind the Granlie car and there was another car parked about twenty feet in front of it. At the time of the accident Harold and his wife were saying goodnight to Harold's mother. Just before the accident defendant was driving his car west on Washington boulevard. His wife and Mr. and Mrs. Krueger were also in his car at the time. Defendant admits that he "side-swiped" the car that was parked back of the Granlie car, that he then struck the Granlie car and pushed it forward until it struck the car that was parked twenty feet in front of it, but, he testified, that as he was proceeding westward a westbound machine drove by him, swung in front of his car, and that either the rear bumper or the rear fender of that machine hooked on to the front bumper of defendant's car and threw it to the left and against the parked car; that when this westbound car struck his front bumper "it naturally threw the control of the car out of my hands. I didn't know what happened, and the car swerved toward the curb." Plaintiffs introduced evidence that at the time of the occurrence defendant's car was the only one proceeding westward.

Defendant contends (1) "There is no evidence to support the charge that defendant was negligent or that he failed to keep his automobile under proper control." (2) "There is no competent evidence to support the charge that defendant was in a state of intoxication." (3) "There is no evidence to support the charge that defendant operated his automobile at a high and dangerous rate



of speed." The argument in support of these contentions proceeds upon the assumption that plaintiffs' evidence is practically worthless and that defendant's evidence as to the facts should be taken as true. Defendant assumes in his argument that his car was struck by another car and that he was thereby driven into the parked cars. As we have stated, plaintiffs introduced evidence to the effect that the only car on the street at the time of collision, other than those parked at the curb, was defendant's car. It was the province of the jury to determine the credibility of the witnesses and the weight that should be attached to their testimony, and their verdict and answer to the special interrogatory show clearly that they did not believe the testimony for defendant. Plaintiffs introduced evidence to the effect that defendant appeared to be intoxicated immediately after the accident. Defendant introduced evidence to the effect that he was not intoxicated and that he had not taken any intoxicating liquor that night. Intoxication or drunkenness is a fact which may be proven as other facts are proven. Whether or not defendant was intoxicated was a question of fact for the jury. After a careful consideration of all of the evidence we see no good reason why the jury's findings should be disturbed. As to the contention that "there is no evidence to support the charge that defendant operated his automobile at a high and dangerous rate of speed:" "The general rule is that a party has the right to prove an alleged fact by direct or circumstantial evidence." (Gardner v. Railway Agency, 274 Ill. App. 626, 631.) Harold Granlie testified that defendant's car hit the car back of Granlie's with a "crash;" that defendant's car hit his car with a "bang" and pushed his car forward until it bumped into the car twenty feet in front of his car; that defendant's car pushed Granlie's left rear wheel over the curbstone, which was about six inches high, and up on the parkway, breaking Granlie's whole rear axle, the trunk, and the axle housing; that the collision was so great that the seat he was sitting on was broken and the back of the seat was bent back seven inches;



that right after the accident the front bumper of defendant's car was hanging on one bolt; that the left front of that car was torn loose. Lillian Granlie testified that when defendant's car crashed into the Granlie car "the impact was so terrific I hit the top of the car and fell over my husband and hit my head up against the windshield." Arnie Enger, who lived at 2243 Washington boulevard, testified that he was in bed at the time of the accident and that he "was awakened by the terrific crash;" that he went downstairs and looked at the different cars; that Granlie's car was damaged in the rear as well as the front; that it had been driven into the car that was parked up ahead and Granlie's bumper became entangled with the bumper of that car so that they were not able to force them apart until they got a plank and lifted up one of the cars. Defendant testified that after the accident he found the bumper of his car behind his car; that the front bumper on the Granlie car was interlocked with the machine that was parked ahead of it. The jury were warranted, under all the circumstances, in finding that defendant was traveling at a high rate of speed at the time of the accident.

Defendant contends that there is no evidence in the record to support the wilful, wanton and malicious charge and that therefore the trial court erred in refusing to grant his motion "to dismiss from plaintiffs' complaint the charge of wilful and wanton misconduct," and that defendant was prejudiced by the action of the court in allowing the wilful and wanton misconduct <sup>charge</sup> to go to the jury. We find no merit in this contention. In addition to the evidence as to high speed and intoxication, the following appears: Defendant was proceeding westward upon a wide thoroughfare upon which only westbound traffic was allowed; there were no other cars proceeding westward at the time; and the fact that defendant drove his car into automobiles parked at the curbing, when considered in the light of other circumstances shown, would warrant a jury in finding that defendant was operating his automobile at the time





in question with a total disregard of the rights of other persons lawfully upon Washington boulevard.

Defendant contends that the court erred in giving an instruction interpreting wilful and wanton misconduct, and also in giving to the jury the special interrogatory. The instant contention is based upon the assumption that there is no evidence in the record of any wilful and wanton misconduct on the part of defendant, and what we have heretofore said answers it.

Defendant finally contends that the judgment order does not include the special finding of the jury, and is therefore defective. Peiffer v. French, supra, is cited in support of this contention. Defendant has reason to be grateful that the trial court did not include in the judgment a finding that malice was the gist of the action. The judgment entered is not defective, but under it no writ of capias ad satisfaciendum can be issued.

Defendant has had a fair trial and should be well satisfied with the judgment that was entered.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.



41799

MYRTLE LAYNE,  
Appellee,

v.

PRUDENCE LIFE INSURANCE  
COMPANY, a corporation,  
Appellant.

224  
APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

3121.A.1821

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to collect \$196 alleged to be due her under the terms and provisions of a Hospital and Surgical Operation Expense Policy issued to plaintiff by defendant. The case was tried by the court without a jury and there was a finding and judgment in favor of plaintiff in the sum of \$91. Defendant appeals.

Under the provisions of the policy defendant agreed to insure plaintiff against loss due to hospital residence, surgical operation and x-ray examination, necessitated directly and independently of all other causes by sickness or disease contracted and beginning after the policy was in force not less than thirty consecutive days from its date and causing loss commencing while the policy was in force. The policy provided that it did not cover "diseases affecting organs not common to both sexes," with the exception that it covered "hospital expense arising out of pregnancy or childbirth." The policy also provided that "Written notice of injury or of sickness on which claim may be based must be given to the Company within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness." This provision follows the language of the Illinois Insurance code (Ill. Rev. Stat. 1939, ch. 73, sec. 969 (4) (C)4).

The complaint alleges that plaintiff had undergone an "abdominal operation" and as a result thereof was confined in a hospital from February 26, 1940, to March 14, 1940. The complaint sets up the policy, and alleges that under its terms and provisions

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plaintiff is entitled to recover for expenses incurred by reason of her abdominal operation.

Plaintiff testified that about ten months after the policy was delivered to her she consulted Dr. Lery, who told her that she was in need of an operation and recommended that she have one; that at his direction she entered the North Chicago Hospital on February 26, 1940, and was there fifteen days; that Dr. Lery operated on her on February 27; that the nature of her operation was removal of the ovaries; that about three or four days after the operation she developed influenza. Dr. Lery testified that he had been plaintiff's physician for approximately three years; that in February, 1940, he examined plaintiff and told her that an operation was necessary; that he arranged for her admission into the North Chicago Hospital and on February 27, 1940, performed the operation upon plaintiff; that plaintiff had cysts on both ovaries and that he removed them both; that the ovarian organs are "peculiar solely to the female;" that four or five days after the operation influenza developed, which required plaintiff to stay in the hospital a longer period; that whether the influenza was from causes independent of the operation, or whether the operation was the cause of that type of influenza, he could not say; that the influenza required hospitalization. The doctor further testified that he wrote out the answers on defendant's Exhibit 1 approximately four or five days before plaintiff had the influenza; that he made no other report to defendant, as he was never asked to submit any other report; that in the report (defendant's Exhibit 1) he made no mention of influenza because at that time plaintiff did not have influenza; that he filled in that report on February 28, 1940. The doctor further testified that "there is no question but that the ovaries are organs peculiar to the female sex." Dr. Lery's report to the defendant company is dated February 28, 1940. The pertinent questions and answers are: "14. What surgical operation has been performed? Oophorectomy - left salpinlectomy. When?



February 27, 1940." The notice of claim sent by plaintiff to defendant is signed by her and dated February 29, 1940. Plaintiff testified that she filled out the answers to the questions on February 27 but that she did not date the notice until February 29, 1940. The material questions and answers contained in the notice are as follows: "5. Are you now confined in a hospital? Yes. Name & Address of Hospital North Chicago. Clark St. 6. When did you first notice that you were beginning to get sick? I noticed it about the middle of Jan. and went to Doctor Febr. 5th. 7. What is the nature of your illness? Ovarian - Kindly refer to Dr. Lery." A few days after plaintiff had made out her notice of claim to the Company the influenza developed. The hospital records show that it set in on March 3, 1940.

The trial court properly refused to allow plaintiff anything for the operation performed and the expenses incident thereto, but he rendered judgment for plaintiff in the sum of \$91, "for the time the lady had influenza," although, as defendant contends, all of the testimony in reference to expenses incurred by plaintiff related to the operation.

Counsel for defendant contended in the trial court and contends here that defendant did not know until the time of the trial that plaintiff developed influenza after the operation; that neither the notice served upon the Company nor plaintiff's statement of claim refer to the influenza. Defendant strenuously contends that "plaintiff's service of notice of claim for an ovariectomy is of no legal consequence because the defendant was never liable for any expenses incurred by plaintiff due to a disease 'affecting organs not common to both sexes;' " that defendant, after receipt of the notice, took cognizance of the fact that plaintiff's notice of claim was based upon an illness expressly excluded from the benefits of the policy; that to permit plaintiff to recover for expenses relating to her influenza "is in effect allowing her to file a new claim for which she never gave notice."





Defendant contends that "plaintiff's giving of notice was a condition precedent to her right of recovery," and that "plaintiff's notice of claim for ovarian disease does not operate as notice for influenza contracted while convalescing from the ovariectomy because the original notice was of no legal consequence." Plaintiff concedes, apparently, that the giving of notice by plaintiff was a condition precedent to her right to recovery, but contends that the notice given "was a substantial compliance with the provision of the policy regarding notice of disability and that defendant having received notice of plaintiff's confinement to the hospital and of her ovariectomy was placed upon such notice as would require it to exercise ordinary diligence to ascertain the development of further complications and diseases." It is a sufficient answer to plaintiff's contention to say that plaintiff's notice of claim was based upon an ovarian illness, which illness was excluded from coverage by the terms of the policy. Plaintiff's position as to the notice is not sound, and we are obliged to hold that her failure to notify defendant Company of the illness upon which she now bases her claim bars her recovery under the policy.

It is regrettable that notice was not given the defendant as to the influenza illness. Plaintiff testified that she showed Dr. Lery her policy, and it seems reasonably clear from the record that it was assumed by plaintiff and Dr. Lery that the policy covered the ovarian illness and operation.

The judgment of the Municipal court of Chicago is reversed.

JUDGMENT REVERSED.

Sullivan and Friend, JJ., concur.



41198

ERNEST PALMER, Director of  
Insurance, State of Illinois,  
as liquidator of Builders &  
Manufacturers Casualty Co.,  
Appellee,

v.

GLEN A. LLOYD,

Appellant.

230  
APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

312 I.A. 182<sup>2</sup>

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

In January, 1938, Builders & Manufacturers Mutual Casualty Company, the original plaintiff herein, brought suit against Glen A. Lloyd and Alvin Pahlman for the recovery of earned premiums claimed to be due on a workmen's compensation insurance policy and a public liability insurance policy. Subsequently plaintiff was reinsured by Builders & Manufacturers Casualty Company, <sup>another</sup> ~~another~~ casualty company bearing a similar name. In April, 1938, Ernest Palmer, Director of Insurance for the State of Illinois, as liquidator of the latter company, was substituted as plaintiff. The cause was tried by the court and a jury, and at the close of plaintiff's case Pahlman was dismissed from the proceeding on motion of plaintiff, and the court directed a verdict against Lloyd for \$745.88 at the close of all the evidence, and entered judgment accordingly. Lloyd has prosecuted this appeal, in which plaintiff has filed a notice of cross-appeal, claiming the additional amount of \$83.23 as interest.

From the essential allegations of the complaint it appears that on or about November 20, 1936, defendants were engaged in the erection of a residence building in Lake county, Illinois, and by virtue thereof came within the requirements of the Illinois Workmen's Compensation act. Lloyd was the owner of the building then in process of erection, and Pahlman was engaged by him to supervise the construction thereof, and it is alleged that he had authority to act in connection therewith for the benefit and protection of

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UNITED STATES  
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REPORT  
ON THE  
MANUFACTURING  
INDUSTRY OF  
THE UNITED STATES  
FOR THE YEAR  
1914

The manufacturing industry of the United States in 1914 was characterized by a general expansion of production and a corresponding increase in the demand for raw materials and labor. The principal factors contributing to this growth were the continued improvement in the efficiency of the manufacturing process, the expansion of the foreign market, and the increasing demand for consumer goods. The manufacturing industry of the United States in 1914 was characterized by a general expansion of production and a corresponding increase in the demand for raw materials and labor. The principal factors contributing to this growth were the continued improvement in the efficiency of the manufacturing process, the expansion of the foreign market, and the increasing demand for consumer goods.

the owner; that pursuant to the employment Pahlman applied to plaintiff insurance company, which was incorporated and licensed to do a general casualty insurance business under the laws of this state, for two insurance policies, one being designated as a workmen's compensation insurance policy and the other as a public liability insurance policy, both to be effective as of November 20, 1936. The policies were issued and, November 30, 1936, the insurance company caused to be filed with the Illinois Industrial Commission a certificate of insurance protecting the workmen employed in the erection of the building and defendants as owners and employers against personal liability in the event of an injury to any employee on said building while so engaged. The policies of insurance were originally issued and delivered to Pahlman, but afterward, about January 15, 1937, they were amended by a rider thereon making Lloyd principal insured under the terms thereof. Under the provisions of these policies there was paid by defendants a deposit premium of \$73 on the workmen's compensation policy and \$10 on the public liability policy. The policies provided for the making of an audit of the payrolls of defendants, quarterly, for the purpose of computing the earned premiums thereon. It was alleged that about March 15, 1937, defendants submitted their payroll records to plaintiff's auditor for the period beginning November 20, 1936, and terminating February 27, 1937, and that the audit developed an earned premium of \$534.30 on the compensation policy and \$15.71 on the public liability policy; that after allowing credit for the deposit premiums theretofore paid, there became due plaintiff the sum of \$467.01, which defendant upon demand refused or neglected to pay. The complaint alleges that the policies continued in full force and effect until plaintiff cancelled them under the terms thereof May 24, 1937, and that upon termination plaintiff demanded of defendants, under the terms and conditions of the policies, that they submit to plaintiff their payroll accounts for the period ending May 24, 1937, and subsequent to the previous



audit, but that defendants refused to produce their payrolls for examination and audit, with the result that plaintiff was unable to compute a just and true premium for the remainder of the term. Along with the complaint plaintiff filed copies of both policies, with riders attached thereto, for the court's consideration.

Since Pahlman was dismissed from the proceeding it will be unnecessary to summarize the averments of his answer, but Lloyd by his verified answer admits that he was engaged in the erection of a residence in Lake county, Illinois, on or about November 20, 1936, and was the owner thereof. He denies that Pahlman was engaged by him to supervise the erection of the building, or that he was authorized or directed to do each and everything in connection therewith for Lloyd's benefit or protection. He denies that Pahlman applied for the two insurance policies described in the complaint pursuant to any employment on his part; admits that the two insurance policies were issued by plaintiff, but denies that they were issued to him on or about the 28th day of November, 1936, or that said policies insured him on said date. Lloyd denies that plaintiff caused to be filed with the Industrial Commission on or about November 30, 1936, a certificate of insurance protecting the workmen employed in the erection of the building being constructed by him and protecting him as an employer of said workmen. He admits that the policies were subsequently amended by a rider making him the principal insured, and avers that the policies were cancelled April 30, 1937. He "admits the payment of said deposit premiums as alleged in said complaint," and also "admits the allegations contained in par. 9 of said complaint," which charges that the "policies of insurance provided for the making of an audit of the payrolls of said defendants, quarterly, for the purpose of computing the earned premiums thereon." Lloyd denies that he submitted his payroll record to an auditor for plaintiff, but on the contrary alleges that the record was procured by the auditor without his knowledge or consent, and denies that the auditor was lawfully

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entitled to examine such record for the period from November 20, 1936, to February 20, 1937. He further denies that the policies of insurance continued in full force and effect until May 24, 1937, but avers that he cancelled them April 30th of that year upon learning that plaintiff was demanding of him premiums in excess of the rates stipulated in the policies and covering a period during which he was not insured. He denies that there has been an earned premium subsequent to March 16, 1937, or that he is indebted to plaintiff in the sum alleged in the complaint.

After the pleadings were filed the court entered an order April 19, 1938, on plaintiff's motion, amending all pleadings so far as party plaintiff was concerned, by making Ernest Palmer, Director of Insurance for the State of Illinois, as Liquidator, plaintiff in the proceeding.

Shortly thereafter the court entered a further order that defendants, Lloyd and Pahlman, submit to plaintiff or its duly authorized auditor all payroll records, vouchers and entries for such payroll for the period commencing November 20, 1936, and terminating May 24, 1937, for all operations described in the policies of insurance, within ten days thereafter, and assigning the case for trial.

Before proceeding to trial plaintiff's counsel submitted an amendment, which alleged in substance that subsequent to the issuance of the policies of insurance by Builders & Manufacturers Mutual Casualty Company, this company was reinsured by the Builders & Manufacturers Casualty Company, with the approval of the commissioner of insurance of the State of Illinois. Lloyd filed an answer to the amendment averring that he had no knowledge as to whether the original company was reinsured, and interposed the additional defense that the cause should be dismissed for the reason that plaintiff failed to comply with par. 146, sec. 22 of chap. 110, Illinois Revised Stats., 1941, which provides that an owner of a nonnegotiable chose in action, where suit is brought in his own name, shall

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allege on oath in his pleading that he is the actual bona fide owner thereof, and set forth how and when he acquired title.

The principal defense interposed and relied upon by Lloyd is that the policies were taken out by Pahlman and issued in Pahlman's name; that Pahlman had no authority to order these policies for Lloyd's benefit or protection; and that since the policies were issued to Pahlman for the period from November 20, 1936, to January 15, 1937, when Lloyd's name was substituted for Pahlman's by a rider, he (Lloyd) should not be held liable for the earned premiums claimed to be due on these policies during that period.

We revert to paragraph 8 of the complaint, which alleges that under the terms of said policies of insurance "there was paid by the said defendants a deposit premium, \$73 on the workmen's compensation policy, and \$10 on the public liability policy," and the admission in Lloyd's answer that "he admits the payment of said deposit premiums as alleged in said complaint." Lloyd now argues that this does not amount to an admission, since the suit was a joint one and his answer merely admits the payment of deposit premiums as alleged in the complaint, which charges that under the terms of the policies there was paid by "defendants" the aggregate deposit premium of \$83; and his counsel says that "even though we assume that Lloyd did pay the deposit premium, of what significance is that in attempting to establish the liabilities contended for by plaintiff as to him. Counsel for plaintiff quite well know that Lloyd did not pay the deposit premium in the first instance. The record is barren of any evidence on the point and the argument is not justified. Even though Lloyd had paid the deposit premium in the first instance that would not cause him to be liable for premiums for the period prior to January 15, 1937, as he was not designated as the insured in the policy. In other words, he got nothing, and therefore why should he be forced to pay?" As against this contention we find in evidence plaintiff's

*plaintiff introduced in evidence*



exhibit 10, which is a written statement signed by Pahlman in the presence of two witnesses, C. J. Cummings and S. M. Gliatto, wherein Pahlman states: "I ordered the above policies effective 11-20-36 at Mr. Glen A. Lloyd's order to protect Mr. Lloyd's interests with respect to building his home near Libertyville, Ill. I paid \$73 for policy WC-62135 and \$10 for policy L-4582 to Broker, Mr. Fred L. Thies and was reimbursed for the above policies premium by Mr. Lloyd on our next meeting. As near as I can remember I received the above policies from Mr. Thies about five (5) days after the effective date \*\*\* and delivered those policies \*\*\* to Mr. Lloyd personally about one week after they were received by me. About a week later Mr. Lloyd, after reading policies, discovered they were made to Alvin Pahlman as insured instead of Glen A. Lloyd and proceeded to have them indorsed to his name. From period 11-20-36 to 1-15-37 I employed no one or had disbursed any money for anyone's services. My regular employees were laid off by me about 11-19-36 and were instructed to commence working for Mr. Lloyd on or about 11-20-36. As further evidence of this, they were paid individually by check made by Mr. Lloyd. Also I commenced working for Mr. Lloyd on or about 11-20-36 as a foreman and received a regular weekly salary and was paid by check made by Mr. Lloyd. There was no contract in force between Mr. Lloyd and myself except as stated above. Mr. Lloyd has all payroll records as I keep the time and furnish him with payroll information. Mr. Lloyd makes all checks and forwards them to me to hand to workmen." This exhibit was received in evidence over the objection of Lloyd's counsel. Cummings, who witnessed the statement, testified that he was an auditor employed in 1936 and 1937 by the Builders & Manufacturers Mutual Casualty Company and the Builders & Manufacturers Casualty Company; that he tried to get an audit of the payroll records in this case, but was unsuccessful in procuring data; that he secured the foregoing statement from Pahlman, which was transcribed by Cummings in his own handwriting; that it was prepared in duplicate and one copy was retained by Pahlman; that while he was talking to Pahlman, Gliatto, an assistant



auditor, was present, and that he had a conversation about the matter with Pahlman before the statement was prepared. Lloyd's counsel was invited by the court to cross-examine Cummings before the statement was received in evidence, but he declined to do so. Although defendant's counsel objected to admission of this statement, the court received it in evidence and later in the proceeding ruled that it be stricken. We think it should have remained in the record. Pahlman's agency was admitted and his statements as to the initial payment on the policy, payment of wages to workmen, payroll records and other matters were germane to the issues and therefore competent.

Under the pleadings and the evidence it seems fairly clear that the building being erected was owned by Lloyd, that Pahlman was not a general contractor but merely a foreman, supervising the construction of Lloyd's home, that the deposit premiums on the two policies were paid by Pahlman on behalf of Lloyd, who shortly thereafter reimbursed him for the outlay, that the employees on the building worked for Lloyd, who kept the payroll records from information furnished him by Pahlman, and that Lloyd paid all workmen by his own checks. From these circumstances and the admissions in the answer there can be no doubt that Lloyd was the party insured under these policies and for whose protection the policies were issued. The mere fact that the policies were made out in Pahlman's name and so remained for a period of several months until they were changed, on Lloyd's direction, does not exonerate the latter from liability for payment of premiums. Everything in the case points to the one conclusion that Pahlman was merely a foreman on the job, receiving a regularly weekly salary for supervising the construction of a home for Lloyd, and that the policies were taken out for Lloyd's benefit and to protect him against personal liability in the event of an injury to any workman on the building while so engaged.

The second principal defense interposed is that Lloyd should not be held liable for premiums at the rate charged by plaintiff. It is argued that the workmen's compensation policy provides that "the premium is based upon the entire remuneration earned during the policy period of all employees of this employer engaged in the business of operations described in said declaration, together with all





operations appurtenant thereto," and that in item 4 of the declaration the rates a \$100 of remuneration of the various classifications of workmen were filled in in the policy, and Lloyd's counsel says that in directing a verdict against him these rates were not applied in determining the amount of the judgment, but that rates applied were "hourly exposure rates" testified to from an insurance company manual; and that the hourly exposure rates upon which judgment is predicated were much higher than those based upon the remuneration figures provided in the policy. Counsel overlooks the fact, however, that although no hourly exposure rates were stipulated in the declarations, indorsements on the policy made pursuant to the terms of the policy changed the declaration so as to provide for hours of exposure. These indorsements were attached to the policy and became effective under a so-called "Condition L," which was fastened over the written portions in the declaration pursuant to the specific authority given in the contracts of insurance between plaintiff and defendant. Upon careful consideration of the record we have reached the conclusion that the court invoked the proper rate of compensation in directing the verdict of the jury. /

Defendant disputes the termination date of these policies, and says that he is not liable for premiums up to May 24, 1937. These were executed contracts, which left nothing to be done except the payment of premiums provided under the terms of the policies. Condition "A" of the policies provides that the "premium is based upon the entire remuneration earned during the policy period by all employees of this employer engaged in the business operations described in said declaration, together with all operations necessary, incident or appurtenant thereto, or connected therewith, whether conducted at such work places or elsewhere in connection therewith or in relation thereto." The premiums were computed for the period from November 20, 1936, to May 24, 1937, and the policy was not actually terminated until by the company's letter of May 13, 1937, the Industrial Commission of Illinois was notified that the insurance afforded to Lloyd against



the obligations imposed by the Workmen's Compensation act, "under Policy No. WC-62135, is being terminated as of the 24th of May, 1937." The fact that an order was entered by the court April 28, 1938, directing defendants to submit to plaintiff their payrolls for the purpose of computing premiums, does not substantiate defendant's contention, because that very order mentioned May 24, 1937, as the date for termination of "all operations described in the policies of insurance \*\*\*." In fixing this particular date period the court resorted to the provisions of the policy, and we can conceive of no reason why defendant should not be liable for premiums up to the termination date, May 24, 1937.

At the conclusion of the hearing plaintiff requested interest on the principal sum then due. This request was made in the form of a motion for judgment against Lloyd of \$745.88 and interest thereon from May 24, 1937. Since under the terms of these policies the premiums became due when the policies expired, we think plaintiff is entitled to recover interest from the date of expiration. (Sec. 2, chap. 74 Ill. Rev. Stats., 1941.) In Employers' Liability Assurance Corporation v. Kelly-Atkinson Construction Co., 195 Ill. App. 620, an action was brought by the insurer to recover additional premiums on certain policies of insurance. It was urged that it was error to instruct the jury that insurer would be entitled to statutory interest on amounts found to be due from the time they became due under the terms of the policy. The court concluded otherwise, however, and said (p. 635): "It is urged that it was error to instruct the jury that plaintiff would be entitled to statutory interest on amounts found to be due from the time they became due under the terms of the policy. The instruction was proper, as the facts bring the case within section 2, chap. 74, Hurd's Rev. St. Each policy was 'an instrument in writing' on which money became due. The money or premium became due on each policy when it expired. Defendant recognized that fact by then charging itself therewith on its books. The fact that a controversy subsequently arose as to the correct amounts of



the premiums does not affect the right to interest thereon, inas-  
much as plaintiff's contracts were performed and accepted and the  
amount due on each policy was easily calculable at the time it  
expired and stands finally liquidated and ascertained as of that  
date. (Bauer v. Hindley, 222 Ill. 319; Elgin, J. & E. Ry. Co. v.  
Northwestern Nat. Bank of Chicago, 165 Ill. App. 35, and cases  
cited therein.)\*

For the reasons set forth we hold that the Circuit court  
erred in not including in its judgment the interest demanded in  
plaintiff's complaint, and accordingly judgment of the Circuit  
court is reversed and the cause remanded with directions to enter  
judgment that will include the amount of the premiums due, plus  
interest at 5% per annum from May 24, 1937, the date on which the  
policies were terminated and the premiums became due.

JUDGMENT REVERSED AND CAUSE REMANDED  
WITH DIRECTIONS.

Scanlan, P. J., and Sullivan, J., concur.



41441

THE NEW ENGLAND COMPANY,  
a corporation,  
Appellee,

v.

THE PARKING METER CORPORATION  
OF AMERICA, a corporation,  
Appellee.

MILLER METERS, Inc., a corpor-  
ation, and DUNCAN METER COR-  
PORATION, a corporation,  
Garnishee-Defendants below,  
Appellees.

NEWMAN S. PRICE, Intervening  
petitioner below,  
Appellee,

v.

HARVEY SHAW, Intervening  
petitioner below,  
Appellant.

24A  
APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

312 I.A. 183

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

August 18, 1939, the New England Company, an Ohio corporation, instituted an attachment suit against the Parking Meter Corporation of America, also an Ohio corporation, making Miller Meters, Inc., and Duncan Meter Corporation, garnishee defendants. The suit was based upon a judgment of \$503.05, entered in favor of plaintiff June 29, 1939, in the Municipal court of Cleveland, Ohio. Harvey Shaw, the appellant herein, and Newman S. Price, who has not joined in this appeal, had leave to intervene in the garnishment proceeding, respectively on September 12, 1939, and October 27, 1939. Price's claim was predicated upon a judgment against the Parking Meter Corporation of America, obtained in the Municipal court of Cleveland, Ohio, on May 31, 1939, and a levy made pursuant thereto on August 11, 1939. Shaw's claim was based on an alleged bailment of 300 meters to which he claimed title and which were in the possession of the Duncan Meter Corporation. Pursuant to a hearing in the Municipal court of Chicago May 17, 1940, the Miller Meters, Inc., was discharged as garnishee; the

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1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

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• ۱۰۰٪ از بیماران مبتلا به سرطان کبد، در ایران، در مرحله پیشرفته تشخیص داده می‌شوند.

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court found that the Duncan Meter Corporation was holding 340 meters belonging to the Parking Meter Corporation of America, and directed that these 340 meters be divided between the New England Company, plaintiff in the garnishment proceeding, and Newman S. Price, one of the intervening petitioners. The petition of Harvey Shaw was dismissed.

The essential facts disclose that in October, 1938, Duncan Meter Corporation sold to the Parking Meter Corporation of America, 1,000 parking meters, for which a bill of sale was issued and delivered to the purchaser. Subsequently the Parking Meter Corporation sold 300 of these 1,000 meters to one William Domroe, for which a bill of sale was given to Domroe, and the Duncan Meter Corporation was advised of the sale. May 10, 1939, Duncan Meter Corporation wrote Domroe, who resided in New York, that "In accordance with your instructions we have today set aside for you three hundred (300) Miller Multiple Coin Parking Meters, Nos. WD-1 to WD-300 inclusive, as covered by Bill of Sale issued to you by the Parking Meter Corporation of America. These meters are stored in our warehouse subject to your shipping instructions. It is hereby understood that these meters are held at your risk subject to all hazards excepting fire and theft." On June 9, 1939, Domroe wrote a letter from New York to Duncan Meter Corporation confirming a telephone conversation of that date, in which he said: "Please be notified that I want the three hundred (300) meters owned by me, which you are now holding to be set up as follows: \*\*\* As soon as possible, please ship the above meters to Harvey Shaw, c/o Manhattan Storage and Warehouse Co., 52nd Street and Seventh Avenue, New York, N.Y." For some reason which is not explained of record the Duncan Meter Corporation failed or refused to ship these meters to Shaw, and thereafter the company was served as garnishee in an action brought against the Parking Meter Corporation of America by the New England Company, predicated on a judgment obtained subsequent to the pur-



chase of the meters by Domroe from the Parking Meter Corporation of America.

Neither the New England Company nor Price have joined in this appeal, and the only parties before us are Harvey Shaw, the appellant, and Duncan Meter Corporation, the garnishee. The sole question presented upon the hearing of the garnishment proceeding and the intervening petitions was whether the three hundred meters found by the court to be in the possession of the garnishee should be awarded to Shaw by reason of his intervening petition, as against plaintiff, the New England Company, and Newman S. Price, a judgment creditor, who also intervened.

Counsel for Duncan Meter Corporation take the position that Shaw failed to prove his title to the property by a preponderance of evidence and therefore failed to show that he was lawfully entitled to the 300 meters in question. It is argued by their counsel that under sec. 29 of the Attachment act (chap. 11, Ill. Rev. Stats., 1941), and the decisions interpreting it, the only question before the court upon an interplea is the title to the property in dispute, and they say that Shaw introduced no evidence to establish his claim of ownership of these 300 meters, and consequently the court was justified in finding the issues against Shaw.

It seems to us, however, that Shaw satisfactorily proved his right to these meters by means of the letters from which we have hereinbefore quoted excerpts, and other circumstances of record. There can be no doubt that these 300 meters were purchased by Domroe from the Parking Meter Corporation of America, and subsequently stored in the warehouse of the Duncan Meter Corporation, subject to Domroe's shipping instructions. The letter of May 10, 1939, unequivocally so states. It was clearly established that the bill of sale to Domroe was exhibited to the Duncan Meter Corporation, who acknowledged the purchase. Later, June 9, Domroe evidently communicated with the Duncan Meter Corporation by telephone, and then confirmed his conversation in a letter of that

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date notifying Duncan Meter Corporation that he wanted the 300 meters owned by him to be shipped as soon as possible to Shaw in New York city.

Counsel for appellees stress the fact that there is no evidence to show that Shaw purchased these meters from Domroe, or that any consideration passed between him and Domroe. Proof of this character was not necessary because it is apparent from the correspondence that Domroe had negotiated some transaction with Shaw through which he had transferred his right to these meters to Shaw, and desired the Duncan Meter Corporation to ship them accordingly. Moreover, the Duncan Meter Corporation evidently recognized the transfer to Shaw, because after Shaw had in paragraph 1 of his amended intervening petition alleged the purchase of these three hundred meters April 18, 1939, from Parking Meter Corporation, the passing of a bill of sale to evidence the purchase and notice to the Duncan Meter Corporation, he also set forth his purchase "for good and valuable consideration, the said 300 parking meters from the said William Domroe." This allegation was admitted by the sworn answer of the Duncan Meter Corporation. The garnishee having thus admitted the allegations of Shaw's ownership of these meters, it became unnecessary to adduce any evidence to prove it. The authorities in this state are clearly to that effect. In Macaulay v. Jones, 295 Ill. 614, the court said: "It is not necessary to introduce evidence of what is admitted by the pleadings, \*\*\*." And in Pierce v. Reeve, 306 Ill. App. 400, the court stated the rule as adopted by our courts of appeal to be "that where allegations are contained in the pleading of one of the parties, it is not necessary to offer evidence of the facts alleged if they are admitted by the pleading of the other party." (Citing Macaulay v. Jones, supra.)

Shaw's counsel predicated the case largely upon the law of bailments. They argue that the evidence conclusively demonstrates that a bailment relationship existed between Shaw and the



Duncan Meter Corporation as a matter of law, and that under the authorities (citing Hodges v. Hurd, 47 Ill. 363; Marshall Milling Co. v. Rosenbluth, 231 Ill. App. 325; Sugar Supply Corporation v. Great Lakes Transit Corp., 272 Ill. App. 129, where property in the hands of the bailee is sold by the owner and the bailee is notified of such sale, the notice will work a change of possession into the hands of the vendee, and the consent of the bailee is immaterial.

Whether Shaw's claim be predicated upon the law of bailments or upon his title to the 300 meters by reason of the evidence adduced and the admitted allegations of the intervening petition, is of no particular consequence. We are convinced, after a careful consideration of the record and the authorities, that Shaw was entitled to prevail under his intervening petition. The judgment of the Municipal court is reversed, and since there is no conflict whatever in the evidence it would serve no useful purpose to remand the cause for hearing. Accordingly, judgment is entered here in favor of Harvey Shaw, intervening petitioner, commanding the Duncan Meter Corporation to deliver to him the 300 Miller Multiple Coin Parking Meters, Nos. WD-1 to WD-300, inclusive, and that Shaw have judgment here for costs in his favor.

REVERSED AND JUDGMENT HERE FOR HARVEY SHAW  
AND AGAINST DUNCAN METER CORPORATION,  
COMMANDING IT TO DELIVER ~~XXX~~ TO HIM THE 300  
MILLER MULTIPLE COIN PARKING METERS, NOS.  
WD-1 TO WD-300, INCLUSIVE, AND FOR COSTS.

Scanlan, P. J., and Sullivan, J., concur.





41528

KATHRYN C. LARKIN, individually  
and as president of the D. F.  
LARKIN & SON, Inc., and D. F.  
LARKIN & SON, Inc., a corporation,  
Appellees,

v.

KENNETH G. ENRIGHT,

Appellant.

APPEAL FROM SUPERIOR  
COURT, COOK COUNTY.

3121.A.184

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Kathryn C. Larkin, individually, and as president of the D. F. Larkin & Son, Inc., and the corporation, D. F. Larkin & Son, Inc., filed a complaint to restrain Kenneth G. Enright, defendant, from voting two shares of stock standing in his name on the books of the corporation, to restrain the directors elected by the votes of these two shares at a previous meeting of stockholders from participating in the voting at any meeting of the directors, to restrain defendant from collecting any money owing to the corporation, and for other injunctive and equitable relief. A temporary injunction issued as prayed, and after issue joined the cause was referred to a master in chancery who recommended that a decree be entered in favor of plaintiffs. Exceptions to the master's report were overruled and final decree was entered in accordance with the master's findings and recommendations, which defendant seeks to reverse by this appeal.

From the essential findings of the master it appears that D. F. Larkin & Son, Inc., was incorporated under the laws of Illinois in 1928, with a capitalization of \$5,000 represented by 50 shares of common stock of the par value of \$100 each. The incorporators were George F. Larkin, Kathryn C. Larkin, his wife, and Agnes G. Larkin, his mother. Larkin was elected president, Kathryn C. Larkin, vice-president, and Agnes G. Larkin, secretary and treasurer, and these three constituted the board of directors of the corporation. The company was engaged in the retail coal and building material business at 3601-15 W. 63rd street, Chicago.



Of the 50 shares of capital stock 48 shares were issued in the name of George F. Larkin, one share to Agnes G. Larkin and one share to Kathryn C. Larkin. All these certificates bore date December 8, 1928.

Thereafter, and prior to December 4, 1934, George F. Larkin transferred his stock certificate No. 1, for 48 shares, as follows: To his mother, Agnes G. Larkin - stock certificate No. 4, dated October 2, 1930, for 23 shares; to his wife, Kathryn C. Larkin - stock certificate No. 5, dated October 2, 1930, for 23 shares; and to himself, stock certificate No. 6, dated October 2, 1930, for two shares. Thereafter, October 4, 1930, George F. Larkin caused his stock certificate for two shares to be indorsed by him to his wife, Kathryn, and a new certificate for two shares was issued in lieu thereof to Kathryn C. Larkin, dated October 4, 1930. Having made these transfers, stock certificate No. 1, for 48 shares, was indorsed, cancelled and attached to the corporate stock record book.

When George F. Larkin died in July, 1936, his widow, Kathryn, was the owner of 26 shares and his mother, Agnes, was the owner of 24 shares of the capital stock of the corporation. The transfers thus effected were made with a view of vesting control of the corporation in his wife and mother and for the purpose of retaining the Larkin name in the business.

The master found that in the month of May, 1934, George F. Larkin employed defendant, Kenneth G. Enright, to work for the corporation as collector, on part time. Defendant was then employed as a bailiff in the Municipal court of Chicago, but in December, 1934, he severed his connection with the bailiff's office and commenced working for the corporation, full time, in the capacity of collector and salesman, and was placed on the payroll at a weekly salary which he received regularly from December, 1934, until July, 1939.

July 17, 1934, Agnes G. Larkin was elected president,

[illegible][illegible][illegible]

Kathryn C. Larkin, secretary, and George F. Larkin, vice-president of the corporation. For sometime prior to his death George F. Larkin was not actively engaged in the business, and, failing to attend the corporate meetings, the company functioned with only a president and secretary and two members of the board of directors until March 9, 1935.

The master found that during the month of February, 1935, defendant represented to Kathryn C. Larkin that in order to continue with the corporation it was necessary that there be three directors and three distinct holders of the capital stock; that if he held stock in his name it would enable him to represent to certain prospective customers that he had an interest in the business; and that it was thereupon agreed to issue two shares of stock to defendant, which he was to hold in his name for this designated purpose. The master found "that upon said representations and upon the express promise and agreement of the said Kenneth G. Enright that said stock would be returned to the said plaintiff on demand, the said plaintiff indorsed Certificate Number 7 to said defendant, prior to said March 9, 1935; that said certificate was for two (2) shares of the capital stock of said corporation;" that "no consideration was paid for said Certificate of stock by the said defendant at the time of said indorsement to him; that said certificate was given to him for the sole purpose of qualifying him as a Director under the mistaken belief of said parties that a legally qualified director must be a stockholder." At the annual meeting of the board of directors, held March 9, 1935, defendant appeared in the corporate records as one of the stockholders and a member of the board of directors, and also as secretary of the corporation.

The master found that on October 1, 1936, defendant entered into a written contract with the corporation, by the terms of which he was employed for a period of five years, at a weekly salary of \$75; that no consideration was given for this contract, but that it was entered into for the purpose of protecting defendant as to

1. The first question is whether the defendant was in the company of the plaintiff at the time of the shooting. The evidence shows that the defendant was in the company of the plaintiff at the time of the shooting. The defendant was in the company of the plaintiff at the time of the shooting.

future employment in the event the corporation business was sold.

The master further found that later in 1936 certificate No. 8, was issued to defendant for two shares of capital stock in lieu of certificate No. 7, and for the same purpose, and that no consideration passed from defendant therefor. At the same <sup>time</sup> certificate No. 7 was surrendered, marked cancelled and returned to the stock book of the company.

The master found that when defendant commenced working for the corporation there was a balance of \$40,000 due on the first mortgage bond issue; that through the negotiations of defendant and George F. Larkin the semiannual interest, due in October, 1934, amounting to \$1,200, was paid by crediting the receiver with coal purchased from the corporation, and through the joint efforts of defendant and attorneys for the corporation, the semiannual interest due April, 1935, and October, 1935, was reduced \$1,200, and the principal was reduced \$10,000, by payment of \$5,000 in cash and the cancellation of interest coupons approximating \$4,000. As a result of these negotiations the balance of \$30,000 due on the mortgage was by the terms of an extension agreement executed April 7, 1937, extended to become due October 1, 1941.

The master found that April 15, 1937, defendant received a check payable to his order from D. F. Larkin & Son, Inc., for \$700, which was in full payment of back salary and for services rendered by him in the reduction and extension of the aforementioned mortgage.

October 1, 1937, Kathryn C. Larkin demanded the return from defendant of certificate No. 8, for two shares of capital stock, in accordance with his promise, and an altercation arose in which her nose was broken and thereupon defendant left the employ of the company. October 14 of that year defendant returned certificate No. 8 to Kathryn and October 25 following he returned to work for the corporation. Several days later defendant and Kathryn got





into another altercation over the two shares of stock and she was stabbed in the back with a letter opener and taken to a hospital by defendant. Thereafter certificate No. 8 was indorsed by defendant and delivered to Kathryn.

When Agnes G. Larkin, the mother, learned that a stock certificate had been issued in the name of defendant for two shares of the corporate stock, she refused to sign any minutes of the corporation until a new certificate was issued in Kathryn's name. Thereafter, in June, 1938, Agnes and Kathryn Larkin met in the office of their attorneys for the purpose of issuing a new certificate in Kathryn's name, and the master found that in the presence and at the request of Agnes G. Larkin, stock certificate No. 9, bearing no date, for two shares of the capital stock, was issued in the name of Kathryn C. Larkin, in lieu of stock certificate No. 8, for the purpose of putting the stock of record in Kathryn's name. Thereafter stock certificate No. 9 remained in the office of the attorneys for the corporation, at Kathryn's request, and after defendant's demands upon Kathryn and the company's attorneys to deliver this certificate to him, it was, on July 6, 1938, sent by registered mail to Kathryn C. Larkin. Thereafter defendant continued to urge her to deliver this certificate to him, and the master found that on July 15, 1938, defendant threatened Kathryn that unless she indorsed said certificate to him he would put the corporation into bankruptcy; that defendant likewise ordered the employees not to leave the coal yards with deliveries until the certificate was indorsed to him, and he then promised Kathryn that she could have the certificate back any time she requested the return thereof. The corporation was then in default in its mortgage payments under the extension agreement and the master found that Kathryn, believing defendant would carry his threat into execution, and relying upon his promises to return certificate No. 9 to her as he had previously returned certificate Nos. 7 and 8, thereupon indorsed certificate No. 9 to defendant as requested, leaving the



date of the indorsement blank. The master found that defendant immediately took possession of certificate No. 9, and although Kathryn has since requested the return thereof he has refused and still refuses to return it to her, and subsequently signed said certificate as secretary of the corporation, but did not receipt for the delivery of same to him on the stock record book.

In April, 1939, defendant purchased the twenty-four shares of capital stock owned by Agnes G. Larkin, as evidenced by certificates No. 2 and 4. The certificates were then indorsed to defendant by Agnes and delivered to him, and May 15, 1939, stock certificate No. 10 was issued to defendant for 24 shares of the capital stock of the corporation and certificates Nos. 2 and 4 were accordingly cancelled and attached to the stock records.

May 8, 1939, defendant issued to himself stock certificate No. 11, for two shares, which was signed by Agnes G. Larkin, vice-president, but not by Kathryn, who was then president of the corporation.

The stock book and corporate minutes were kept in the office of the attorneys for the corporation until May 8, 1939, but since that date they have been in possession of defendant.

The master concluded that by reason of the circumstances hereinbefore set forth certificates Nos. 9 and 11 respectively, each for two shares of the capital stock, are void and of no effect, and that Kathryn C. Larkin is the legal owner and holder of twenty-six shares of the capital stock of the corporation, and defendant the legal owner and holder of twenty-four shares thereof.

It appears that during the year 1936 defendant and Kathryn engaged in the stoker business as a "sideline," and that Kathryn invested \$185 in the enterprise; that after defendant left the employ of the corporation in 1937 he commenced a stoker business of his own, which he operated for about four months, but continued to draw his salary from the corporation during that period; that thereafter he moved the stoker business back to the corporation's office



and continued with Kathryn to operate the same in addition to the coal business; that he purchased stokers and parts in the name of the corporation, and that all accounts were paid by the corporation; that in the fall of 1938 defendant moved stokers and parts to his home, without accounting to the corporation therefor, by reason whereof the corporation was responsible for the payment for the stokers and parts.

The master tabulated various items collected by defendant from June 20 to July 15, 1939, as shown by entries made in the records of the corporation, aggregating \$530.61; that of this total collected by defendant he deposited to the credit of the corporation, July 8, 1939, the sum of \$52.15, leaving a balance of \$478.46 unaccounted for, and that there is now due and owing from defendant to the corporation the sum of \$478.46.

It thus appears that with the twenty-four shares purchased by Enright, of which he was the legal owner, together with the two shares represented by stock certificates Nos. 9 and 11, which the master found rightfully belonged to Kathryn C. Larkin, defendant sought to gain control of the corporation, elect directors and perform the other acts complained of, which the decree enjoined him from doing.

The principal controversy relates to the ownership of the two shares of stock represented by certificates Nos. 9 and 11. It is urged by defendant that the findings of the master and the decree, holding Kathryn to be the legal owner of these two shares, are manifestly against the weight of the evidence. The gravamen of defendant's contention is that these two shares were given to him by Kathryn as part compensation for his services in reducing the mortgage indebtedness and assisting in consummating the extension of the mortgage in 1937, as well as for services rendered to her personally. The master and chancellor evidently rejected this contention as being untenable and probably for the following reasons: Certificate No. 7 was delivered



to defendant by Kathryn in March, 1935. He had started the negotiations regarding the mortgage in October, 1934, and the reduction and extension of the mortgage was finally consummated in April, 1937. Defendant testified that after the extension was consummated, Kathryn wanted to split her twenty-six shares of stock with him, but he told her the stock would be worth too much for her to do that, and he would rather have her pay his salary and go along until something could be worked out to compensate him for what he had done; that after it became evident the company could not pay him his back salary, Kathryn in February, 1935, told him she wanted to do something for him but did not know what she could do, but that she would give him the two shares of stock and at some later date would make it all right with him. It is further established by the record that on April 15, 1937, some eight days after the extension of the mortgage was consummated, the corporation issued a check for \$700 payable to defendant's order, and that he indorsed it and returned it to the corporation. Defendant's counsel characterize this as a "wash" transaction, but the master concluded that this check represented settlement of all the mutual claims of the parties against each other, including back salaries and any services that had been rendered by defendant to the corporation for which he had not been paid. From defendant's own testimony it further appears that he held stock certificate No. 7 until October, 1937, and when he then left the employ of the corporation he returned the certificate to Kathryn.

From these circumstances it appears that Kathryn delivered this certificate to defendant about two years prior to the consummation of the extension and reduction of the mortgage indebtedness of the corporation, and that, when defendant returned certificate No. 7 to Kathryn upon leaving the employment of the corporation, he could not have considered it as reimbursement for any services rendered, but that he held it, as she testified, merely to qualify him as an officer and director, and returned it as promised when he severed his connection with the company. When defendant left the corporation in 1937





he made no claim for salary or services, nor did he then contend that he owned any shares of stock in the corporation. Certificate No. 8 was evidently issued to him under similar circumstances, and returned by defendant in accordance with his promise to do so when requested.

Defendant explains the issuance of certificate No. 9 to him by saying that when he returned certificate No. 8, Kathryn suggested that she would issue a new certificate in her own name and indorse it over to him, so as to lead Agnes to believe that the stock was held by Kathryn. However, on cross-examination, defendant testified that certificate No. 9 was given to him by Kathryn, that he paid a consideration therefor, and that the consideration constituted services rendered to the corporation and for Kathryn, personally. Since no claim is made by defendant that certificates Nos. 7 and 8 were delivered to him for any services rendered to the corporation or to Kathryn, this contention is not at all plausible; it is only with reference to certificate No. 9 that defendant for the first time makes the claim that it was delivered to him for services rendered, and this undoubtedly led the master and chancellor to conclude that Kathryn was the legal owner of these two shares. The record fully supports that conclusion.

There is the further circumstance that when defendant rendered services in connection with the mortgage he was a director and secretary of the corporation and an employee receiving \$75 a week, and under the law he was not entitled to any extra or additional compensation in the absence of a bylaw or resolution authorizing payment thereof. (Joy v. Joy, 356 Ill. 348, 355; Stevens v. Industrial Commission, 346 Ill. 495, 498.)

The contention that Kathryn "promised at some later date to make it all right with him," is entirely too vague and uncertain to form the basis of a contractual obligation. There is nothing in the record to indicate that Kathryn ever requested defendant to render these services to her personally, and no effort was made to



show the time spent by him in the performance of such service or the fair and reasonable value thereof. The only reasonable inference that can be drawn from the record is that certificate No. 9, like certificates Nos. 7 and 8, were delivered to defendant under the circumstances testified to by Kathryn C. Larkin, and when he refused to return it upon request, as he had returned certificates Nos. 7 and 8, he violated his trust to Kathryn.

Counsel argue the question whether a fiduciary relationship existed between Kathryn and defendant, and cite cases holding that a constructive trust resulted from this relationship, but we do not think our conclusion need be predicated on that theory of law. The transaction disclosed by the record was a simple agreement to hold stock for a limited use and return it upon request, and failure to do so justified the court in restraining defendant from using such stock, which rightfully belonged to Kathryn, to gain control of the corporate affairs.

Six witnesses testified before the master upon this controversial question. The master saw and heard the witnesses and while his findings are not conclusive, nevertheless we think the record amply sustains his findings and conclusions.

There remains only the item in the decree finding that \$478.46 was due the corporation from defendant. He testified that he had collected a number of bills, aggregating \$530.61, and he named the persons from whom the collections were made, the dates, and the amounts collected. The master itemized these collections and they aggregated \$530.61. According to defendant's testimony, he deposited, July 8, 1939, the sum of \$52.15, and he said "That's the only money I deposited in the bank out of these collections." The balance of \$478.46 found to be due the corporation represents the difference between the amount collected and the amount deposited. There can be no fair dispute as to the correctness of this finding. Various other points are argued by the respective parties, but we think they are not controlling and deem it unnecessary to discuss them. We find no convincing reason for disturbing the decree and it is affirmed.

AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.



41580

JOHN FITZPATRICK, President,  
MAURICE LYNCH, Financial Secretary,  
and JOSEPH KEENAN, Recording Secretary  
of the Chicago Federation of  
Labor, etc.,

Appellees,

v.

BLUE STAR AUTO STORES, INC.,  
a corporation,

Appellant.

26A  
APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

3121A. 184<sup>2</sup>

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs, as officers of the Chicago Federation of Labor, a voluntary association owning and operating a radio broadcasting station in Chicago known as "WCFL," brought suit against Blue Star Auto Stores, Inc., to recover payments due under a written contract which required plaintiffs to render radio broadcasting services, advertising defendant's stores by means of 300 announcements, fifty words in length, at the rate of three a day, Monday through Sunday, for which defendant agreed to pay \$157.50 a week, "payable weekly," as invoiced. Advertiser reserved the privilege of continuing the broadcasts "beyond last broadcast date, and announcements purchased on renewal order shall be quoted to advertiser at same rate as herein stipulated." Attached to plaintiffs' statement of claim was a list of seven successive invoices presented to defendant from March 27, 1939, to May 16, 1939, inclusive, aggregating \$1,140.

Defendant's amended defense admits the statement of services rendered, makes no denial of the correctness of the charges aggregating \$1,140, and concedes that nothing was paid under the contract. The defense interposed is that under the written agreement plaintiffs' impliedly promised they would do nothing which would interfere with the business of defendant in return for defendant's undertaking to use the services of plaintiffs; that said implied promise on the part of plaintiffs

REPORT OF THE  
COMMISSIONER OF THE  
LAND OFFICE,  
IN RESPONSE TO A RESOLUTION  
PASSED BY THE HOUSE OF REPRESENTATIVES  
ON JANUARY 10, 1896.  
ALBANY:  
JAMES BROWN PUBLISHERS,  
1897.

DATE: 10/10/1964

1. What is the purpose of the study?  
 2. What are the research questions?  
 3. What are the hypotheses?  
 4. What are the variables?  
 5. What are the methods?  
 6. What are the results?  
 7. What are the conclusions?  
 8. What are the limitations?  
 9. What are the implications?  
 10. What are the future directions?

CLASSIFICATION: UNCLASSIFIED

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SECRET

THE UNITED STATES OF AMERICA

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MEMORANDUM FOR THE RECORD

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was a condition precedent to the obligation of defendant to pay the money provided for in and by said contract; but that contrary to its implied promise, "plaintiff intentionally breached its contract \*\*\* by composing and broadcasting" over its radio station the following false statements: "Do you know the Blue Star Auto Sales Stores are being picketed by the Appliance and Furniture Salesmen's Local Union No. 164 of the International Retail Clerks, which is affiliated with the American and Chicago Federation of Labor? The cause of the strike at Blue Star Auto Sales Stores is that the wages of their salesmen were as low as \$13 a week for 75 hours of work. The Union tried every possible means to negotiate a new standard of wages and hours and failed. Do you know that wages at the Blue Star Auto Sales Stores were far below the minimum necessary to sustain a family in health and comfort?", which "injured the business, credit and reputation of the defendant; that by reason of plaintiff's failure to perform its implied promise, defendant is not indebted to the plaintiff in the sum claimed, or in any sum whatsoever."

Together with its second amended defense, defendant interposed an amended counterclaim which alleges in count 1 that the contract attached to plaintiffs' statement of claim expressly excluded the right of plaintiffs to cancel the agreement, that defendant, pursuant to the terms and provisions of the agreement, continued to use the services of plaintiffs' station beyond the last broadcast date provided for in the contract and that plaintiffs were under a duty to continue to furnish their facilities to defendant as long as defendant continued to employ the same; that contrary to the terms and provisions of the agreement and in violation thereof plaintiffs on May 9, 1939, notified defendant that they were canceling the contract on May 16, 1939; and that, by reason of plaintiffs' violation and breach of the terms and provisions of the contract without cause, defendant was damaged in the





sum of \$10,000 and seeks judgment against plaintiffs in that sum.

The second count of the amended counterclaim alleges the implied promise on plaintiffs' part to do nothing which would interfere with the business of defendant in return for defendant's undertaking to use the services of plaintiffs' broadcasting station; that defendant was a corporation engaged in the business of selling automobile accessories in Chicago, bearing a good name, credit and reputation and enjoying the good opinion of those engaged in this character of business; that, contrary to their implied promise and undertaking, plaintiffs intentionally breached their contract with defendant by composing and broadcasting, by means of radio transmission, the false statements hereinbefore set forth; and that these statements injured the business, credit and reputation of defendant to the extent of \$25,000, for which it seeks judgment against plaintiffs.

The third count of the amended counterclaim alleged in substance that plaintiffs wickedly and maliciously intended to injure defendant and to bring it into public scandal and disgrace by wickedly and maliciously composing and broadcasting, through their radio station, certain libels containing, among other things, false, malicious, defamatory and libelous matters of and concerning defendant and its business, consisting of the statements hereinbefore set forth; that the statements being wholly false, defendant was injured in its reputation, business and credit to the extent of \$25,000, for which it seeks judgment.

After the filing of these pleadings, plaintiffs moved the court to strike defendant's amended counterclaim and for judgment instantaner on their statement of claim and defendant's second amended defense. Attached to plaintiffs' notice of the motion was the affidavit of Glynn J. Elliott stating that there was then pending in the Circuit court of Cook county a cause of action identified

sum of \$5,000 and some general damages against plaintiff in that sum.

The second count of the amended counterclaim alleges the implied promise on defendant's part to do nothing which would interfere with the business of plaintiff in return for defendant's undertaking to use the services of plaintiff's broadcasting station; that defendant was a corporation engaged in the business of selling automobiles accessories in this city, obtaining a good name, credit and reputation and enjoying the good opinion of those engaged in this character of business; that, contrary to their implied promise and undertaking, plaintiff intentionally breached their contract with defendant by composing and broadcasting by means of radio transmission, the false statements, libels and slanders set forth; and that these statements injured the business, credit and reputation of defendant to the extent of \$25,000, for which it seeks judgment against plaintiff.

The third count of the amended counterclaim alleges in substance that plaintiff with intent and maliciously intended to injure defendant and to bring to him public scorn and disgrace by wickedly and maliciously composing and broadcasting, through their radio station, certain libels containing, among other things, false, malicious, defamatory and libelous matters of and concerning defendant and his business, a recital of the statements hereinbefore set forth; that the statements being wholly false, defendant was injured in his reputation, business and credit to the extent of \$25,000, for which it seeks judgment.

After the filing of these pleadings, plaintiff moved the court to strike defendant's amended counterclaim and for judgment in favor of plaintiff on their statement of claim and defendant's second amended defense. Attached to plaintiff's notice of the motion was the affidavit of Guyton L. Elliott stating that there was then pending in the Circuit Court of Cook County a cause of action identified

2s case No. 39-C-6339, in which the matters pleaded in defendant's second amended counterclaim were pending and that the cause involved the same parties as in this proceeding and arose out of the same circumstances as the matters set up in the amended counterclaim herein. The court sustained plaintiffs' motion, dismissed defendant's counterclaim and entered judgment for plaintiffs in the sum of \$1,140, from which this appeal is prosecuted.

The contention set forth in count 1 of the amended counterclaim that plaintiffs canceled the contract on May 16, 1939, in violation of the provision therein to allow defendant to avail itself of the services of plaintiffs' station "beyond the last broadcast date" and therefore owed defendant "a duty \*\*\* to continue to furnish its facilities to the defendant as long as the defendant continued to employ same," is untenable. That provision was contingent on the undertaking by defendant to pay weekly as invoiced the sum of \$157.50. Since the rendering of services contemplated by the agreement, the correctness of the charge and the failure of defendant to pay any of the weekly invoices, stand unchallenged, plaintiffs had the right to cancel the agreement. The amended defense and counterclaim are both silent as to whether the alleged defamatory statements were broadcast before or after May 16, 1939. If made before that date and defendant continued to accept plaintiffs' facilities and services, it would still be obligated for payment of the weekly invoices rendered; if made after the cancellation, defendant had already lost its reserved privilege of continuing the broadcast because of its own breach. Certainly defendant had no unlimited franchise to use plaintiffs' radio station without paying for the services rendered and failure to pay, as expressly agreed by defendant, constitutes a valid ground for canceling the agreement and discontinuing the service.

The same reasoning and conclusions are applicable to count 2



of the amended counterclaim, which is predicated on allegations of plaintiffs' implied promise to "do nothing which would interfere with the business of the defendant, in return for the defendant's undertaking to use the services of the plaintiff."

No date being assigned as to when the alleged defamatory statements were broadcast, defendant could neither continue to accept the services without paying therefor nor invoke the implied promise after the agreement had been canceled for nonpayment of the weekly services.

The subject matter of count 3 of the amended counterclaim and of the amended defense is identical; it relates to the alleged defamatory statements broadcast by plaintiffs. Plaintiffs' counsel filed an affidavit stating that "there is pending in the Circuit court of Cook county, Illinois, a cause of action identified as Case Number 39-C-6339, in which the matters pleaded in the defendant's Second Amended Counter Claim are pending, and the cause involves the same parties as the instant case, and that said cause \*\*\* arises out of the same circumstances as the matters set up in the defendant's Counter Claim pleaded herein." Defendant now argues that "no proof was offered to show the nature of the Circuit Court case," and that "defendant was not permitted to show that the first and second counts of the counter-claim were not in any way involved in the Circuit Court case, the Circuit Court case being nothing more than an action for slander." In the absence of any showing to the contrary Elliott's affidavit was sufficient to identify the two causes. The contention that defendant was not permitted to show that the counts of the counterclaim were not involved in the Circuit court case appears to be without support, because we have searched the record diligently and fail to find any request of the court by defendant to file a counter affidavit or make any showing to challenge plaintiffs' affidavit. Under the



circumstances we think the court was justified in holding that there was another and prior suit pending in which defendant's rights to damages for injury to its business, credit and reputation could be litigated.

Plaintiffs were entitled to judgment on defendant's admission of having received and accepted the broadcast advertising services and of its failure to pay therefor. Nothing contained in this opinion should prejudice any right the defendant may have to prosecute its claim against plaintiffs in the Circuit court for the alleged defamatory broadcast. The order or judgment of the Municipal court is affirmed.

JUDGMENT AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

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41829

HENRY C. ROSSMAN, JR.,  
Appellee,

v.

LONDON L. CHAPMAN,  
Appellant.

APPEAL FROM AN INTERLOCUTORY

ORDER OF THE SUPERIOR COURT

OF COOK COUNTY.

312 I.A. 185

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

April 24, 1941, the trial court entered a preliminary injunction restraining the defendant from interfering with, hindering, obstructing or stopping the business and profession of plaintiff; from watching and spying upon plaintiff and his associates, employees, etc.; from assaulting, intimidating (by threats, insults, slander, violence or otherwise) his associates and employees; and from soliciting, cajoling, compelling, inducing any persons who seek contact with the plaintiff for any purposes whatsoever; and from interfering with or attempting to hinder the plaintiff from carrying on his profession or business in the usual and ordinary way.

This injunction was issued without bond and (as the record shows) without notice. It appears that on April 17, the attorney for plaintiff gave notice that on the following day (the 18th) he would appear before Judge Schwaba and move for an order according to his petition, which reiterated the allegations made in the complaint which was filed April 14. On that day an order was entered reciting that the cause came on to be heard upon petition of plaintiff for a temporary injunction and that leave was given defendant to answer the petition within 3 days and the hearing upon the motion was set for April 28, 1941, at 10:30 A. M. without further notice. The answer was not filed within the time limited and on April 24 the temporary injunction was issued, without further notice. Notice should have been given.

MR. JUSTICE PATRICK, IV, et al. vs. THE STATE OF NEW YORK.  
LONDON L. GORDON, Plaintiff.  
v.  
HENRY C. W. III, Defendant.  
APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

April 24, 1941, the trial court entered a preliminary injunction restraining the defendant from interfering with, hindering, obstructing or evading the business and protection of plaintiff; from molesting and spying upon plaintiff and his associates, employees, etc.; from assassination, intimidating (by threats, insults, violence or otherwise) his associates and employees; and from soliciting, cajoling, compelling, inducing any persons and each contact with the plaintiff for any purposes whatsoever; and from interfering with or attempting to hinder the plaintiff from carrying on his business or business in the usual and ordinary way.

This injunction was issued without bond and (as the record shows) without notice. In response to an April 14, 1941, attorney for plaintiff gave notice to the defendant on the following day (the 18th) he would appear before Judge Roberts and move for an order according to his petition, which reiterated the allegations made in the complaint which was filed April 14. On that day an order was entered reciting that the same came on to be heard upon petition of plaintiff for a temporary injunction and that leave was given defendant to answer the petition within 10 days and the hearing upon the motion was set for April 28, 1941, at 10:30 A. M. without further notice. The answer was not filed within the time limited and on April 28 the temporary injunction was renewed, without further notice. Notice should have been given.

May 14, leave was granted defendant to file a motion to vacate, which was granted May 21. May 23, 1941, an order was entered vacating the order of May 21 and reinstating the original injunction. The trial judge stated that he did not dissolve the injunction but said he wouldn't do anything with it "because I thought it was a matter for the Bar Association". The matter was, of course, for the court. The defendant has appealed from the original order of April 24 and from the subsequent order of May 21 which vacated it.

The record shows that the original order was entered without a bond and (as we have already said) without notice to the defendant. The requirements of the statute as to bond and notice were not complied with. (Smith-Hurd's Anno. Stat., Chap. 69, §§3, 9, pp. 309, 326). It is urged that the orders should be reversed for this reason. We have held we may in such a case examine the whole record to determine whether the order as made was justified under the statute. (Central Trust Co. v. McGurn, 257 Ill. App. 45; Wagner v. Okner, 306 Ill. App. 601). The Wagner Case also holds that notice is not waived by motion of the defendant to set aside (as plaintiff contends) citing authorities which are inaccurate. (Wagner v. Okner, 306 Ill. App. 606).

We have examined the averments of the complaint and a petition of plaintiff. The petition merely repeats parts of the complaint. It adds nothing. It is not verified. We consider only allegations of the verified complaint. The complaint set up in substance that plaintiff and defendant were engaged in the practice of law under the firm name of Chapman & Rossman, as by written agreement, copy of which was attached. Whatever the relation may have been, it was dissolved by notice given to Rossman by Chapman. The relationship began June 15, 1940, and ended on

1944

to verify, and the results of the investigation.

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November 7 of the same year. The complaint named in detail suits in which plaintiff was to share the fees; claimed the total amount accrued was \$1,275.00, only \$78.86 of which had been paid, leaving a balance of \$1,196.14. The complaint averred defendant refused to account and also without cause and contrary to the ethics of the profession at various times assaulted, threatened and slandered plaintiff and solicited his clients. Specifically it was averred, February 1, 1941, defendant attempted to strike plaintiff, saying, "I am going to knock your head off". On the 3rd day of the same month defendant in open court told opposing counsel to get after plaintiff; that plaintiff was inexperienced, and that he should force him into a settlement. On the 24th day of the same month defendant approached a client of plaintiff's and tried to get him to substitute attorneys; that defendant caused stories to be spread that plaintiff was in the army in California; that he was inexperienced and could not handle his cases properly, which defendant could do. The bill said these approaches were sometimes made by defendant himself and sometimes by others. It was averred defendant engaged a client of plaintiff's in conversation in front of plaintiff's office early in the morning before the office was opened and told the client of plaintiff's inexperience, took an interest in his problem and gave to him several cards to distribute to his friends. Later, at a party at the home of a client of plaintiff's, defendant "tried to persuade his wife that Timothy Williams engaged a poor lawyer and that he should go to Landon L. Chapman immediately if he wanted to have success with his case". The following Sunday Chapman went to the house of this client in person and talked with the client and his wife. The complaint



prayed a Master might be appointed to determine the money due on accounting and that "upon notice and hearing" an order should be entered enjoining the defendant from annoying, interfering, threatening, intimidating, meddling, etc. with the business and profession of the plaintiff. While the complaint prayed an injunction upon the hearing, it did not pray a preliminary injunction, and from a careful examination of the facts as the same appear in the record, we hold no cause was shown which would justify a preliminary injunction. The purpose of such an injunction ordinarily and usually is to preserve the status. This injunction does not preserve it but destroys it. (High on Injunctions, 4th Ed., Vol. 1, page 9, §5A). These parties practiced law together and separated with much ill will. Plaintiff says defendant told him he would "knock his head off". He also says that to many persons defendant said that plaintiff was inexperienced, (a charge which neither the complaint nor affidavit says is untrue). Nowhere is it averred that these acts of defendant are about to be repeated nor facts given from which it would appear that there is danger they will be repeated. There is no allegation as to what the conduct of plaintiff toward defendant has been. It is apparent there is very bad feeling between the parties, and we presume each has done his best to take clients from the other. The original injunction was obtained without notice (and the facts appearing as we have recited) should not have been reinstated. Defendant has now filed his answer denying the material averments of the bill. The cause should be tried on the merits and the question of whether an injunction should issue may well await the result of the trial. The orders appealed from will be reversed.

REVERSED.

McSurely, P. J., and O'Connor, J., concur.





41424

TRIBUNE COMPANY,  
a corporation,  
Plaintiff-Appellant,

v.

FRANK RAINEY,  
Defendant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

HARRY S. GREENSTEIN, Trustee,  
Garnishee Defendant-Appellee.

312 T.A. 186<sup>1</sup>

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Tribune Company, procured a judgment for \$17.80 against Frank Rainey for unpaid advertising. Execution issued and served pursuant to this judgment was returned "no property found." This proceeding in garnishment was instituted against Harry S. Greenstein as garnishee, who entered an oral answer of "no funds." His answer was contested and the case was tried by the court without a jury. Evidence introduced upon the trial established that Greenstein, the garnishee, held all of the assets of the principal defendant as "trustee" under an assignment made by Rainey for the benefit of his creditors. Plaintiff challenged the validity of the assignment as to it. The issues were found against plaintiff and judgment was entered against it on such findings and the garnishee ordered discharged. Plaintiff appeals from the judgment.

The evidence disclosed that Rainey had owned and operated an undertaking establishment; that the garnishee, Greenstein, is an attorney at law who represented most of Rainey's creditors; that because Rainey's business was in failing circumstances and his creditors were exhibiting anxiety, the debtor by a written instrument dated February 19, 1938, made an assignment for the benefit of his creditors to the garnishee as trustee; that a schedule of his creditors and the amounts of their respective claims attached to and made a part of the assignment showed

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sixty-eight general creditors, including plaintiff, with claims aggregating \$14,611.37 and four preferred creditors with claims aggregating \$392.28; and that all of Rainey's creditors, except plaintiff, assented or acceded to the assignment.

The preamble of the assignment recites that the debtor was "unable to pay said indebtedness and is desirous of providing for the payment thereof by an assignment of all of his property and effects, except such as may be exempt to him by the laws of the State of Illinois." The assignment then provided that the property conveyed by it should be held by the trustee for the following designated uses and purposes:

"1. To pay \*\*\* the costs of executing this assignment, \*\*\* together with a reasonable fee to the trustee \*\*\*.

"2. To reduce such property to money \*\*\*.

"3. To pay and discharge in full from the proceeds thereof, after deducting all necessary costs, expenses and disbursements including charges for the services of the trustee, so far as the residue of said proceeds is sufficient for that purpose, the claims of all the creditors who shall within ninety days after the execution and delivery of these presents agree in writing to accept the terms and conditions hereof, or within such additional time as may be granted at the discretion of the trustee, ratably and in proportion, in discharge of their said debts by such instalments and at such time as the trustee shall think fit.

"4. To pay any balance remaining to the debtor \*\*\*."

On February 19, 1938, the same date upon which the assignment was executed, the garnishee trustee mailed the following notice of the assignment to all of Rainey's creditors:

"NOTICE TO CREDITORS

"IN RE ASSIGNMENT FOR BENEFIT OF CREDITORS BY FRANK RAINEY, DOING BUSINESS AS RAINEY BROS., 1222 EAST 47TH STREET, CHICAGO, ILLINOIS.

Notice is hereby given to the creditors of Frank Rainey, doing business as Rainey Bros., who made a voluntary assignment for the benefit of creditors, on the 19th day of February, 1938, to file with Harry S. Greenstein, Trustee, at his office at 11 S. LaSalle Street, Chicago, Illinois, written proof of their claims against Frank Rainey, doing business as Rainey Bros., fully verified on or before the 19th day of May, 1938.

Harry S. Greenstein,  
Trustee for benefit of Creditors."

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1. The first of these is the fact that the United States has a large and growing population of people who are not citizens of the United States. This is a result of the large number of immigrants who have come to the United States in recent years, and the fact that many of these immigrants are not naturalized citizens.

Plaintiff contends "that the funds in the hands of trustee-garnishee Greenstein under the purported assignment for the benefit of creditors are subject to garnishment because the assignment is ineffective and void, at least as to plaintiff. This assignment is void because it is on its face a scheme to coerce an unwilling creditor to compromise its entire claim for a fraction of its value, in violation of the law of this state."

The garnishee's answer to plaintiff's contention in this regard is that "the assignment in question for the benefit of the creditors of the debtor, Frank Rainey, is valid as to all of the debtor's creditors, including the plaintiff, notwithstanding plaintiff's non-assent thereto. This assignment contains no express covenant or provision that any such creditor, on assenting to its terms, thereby released or agreed to release the debtor from liability for any unpaid portion of such creditor's claim; and no such covenant or provision can be implied on a proper interpretation or construction of the assignment agreement."

The rules of law applicable to voluntary assignments for the benefit of creditors were considered and discussed by us at some length in the consolidated case of Tribune Company v. Canger, Floral Company and Tribune Company v. Ben Mages. Appellate court Case No. 41276, the opinion in which is filed concurrently with this opinion. In that case we stated:

"The law of this state has always sanctioned honest settlements made by debtors with their creditors or for their benefit because settlements of this character, fairly made, tend to expedite the work of the courts and to avoid protracted delay in distribution and unnecessary waste of assets. The validity of common law assignments for the benefit of creditors as a method of effecting such settlements has long been recognized. (Pogue v. Rowe, 236 Ill. 157.) However, the law is just as well settled that an assignment for the benefit of creditors may be rendered invalid by a debtor annexing thereto conditions onerous to his creditors and favorable to himself.

"\* \* \*

"Thus assignments purportedly for the benefit of creditors, which place such creditors upon the choice of taking nothing at all or a fraction of their claims in settlement of



4  
the whole, are invalid as to nonconsenting creditors."

An assignment for the benefit of creditors being void as to a nonconsenting creditor, whose participation in the distribution of the assets of the debtor is conditioned upon the release by such creditor of his entire claim in consideration of the fractional payment made by the assignee, the question presented here is whether Rainey's assignment contained such an onerous condition.

Plaintiff insists that such a condition is contained in the following language used in the third paragraph of the assignment:

"To pay and discharge in full from the proceeds thereof, after deducting all necessary costs, expenses and disbursements including charges for the services of trustee, so far as the residue of said proceeds is sufficient for that purpose, the claims of all creditors who shall within ninety days after the execution and delivery of these presents file with the trustee a statement fully verified by affidavit of the debt due and owing by debtor and who shall within ninety days after the execution and delivery of these presents agree in writing to accept the terms and conditions hereof, or within such additional time as may be granted at the discretion of the trustee ratably and in proportion in discharge of their said debts by such instalments and at such times as the trustee shall think fit."  
(Italics ours.)

It is true that in the foregoing third paragraph, which deals with the acceptance by the creditors of the terms and conditions of the assignment and the distribution by the assignee of the assets of the debtor, resort was had to rather complicated phraseology and involved sentence construction. Stripped to its essentials, the purpose of the assignment as stated in this paragraph with respect to accepting creditors is as follows:

"To pay and discharge in full from the proceeds thereof \*\*\* so far as the residue of said proceeds is sufficient for that purpose, the claims of all creditors \*\*\* ratably and in proportion, in discharge of their said debts by such instalments \*\*\*."

While more apt and less cumbersome language in a more simply constructed sentence could have been used by the assignor to express his intention, we think that, considered in its entirety, this paragraph reasonably construed, does not render the assignment





invalid. "It is the duty of a court when construing written contracts, to determine and give effect to the intention of the contracting parties. In arriving at this intention effect must be given to each clause and word used without rejecting any words as meaningless or as surplusage." Thomas Hoist Co. v. Newman, 365 Ill. 160.

The terms "discharge in full" and "in discharge of their debts" are found in this paragraph, but in each instance such terms are qualified by other language in the text. It will be noted that the expressed intention of the assignor debtor was "to pay and discharge in full" the claims of the accepting creditors "so far as the residue of said proceeds are sufficient for said purpose." This could only mean that if the net proceeds of the sale of the defendant's assets were sufficient to pay and discharge the creditors' claims in full, they would be paid in full, but that if said residue was not sufficient to pay said claims in full, it would be applied in so far as it would go toward the payment of the creditors' claims. There is nothing in this language that would preclude an assenting creditor from compelling the payment of the unpaid balance of his claim by the debtor out of assets subsequently acquired by him. The term "in discharge of their said debts" cannot be isolated and construed by itself. To ascertain the intention of the assignor in the employment of this term, it must also be considered in connection with the text in which it was used. As has been seen, the accepting creditors' claims were to be paid to the extent of the residue of the proceeds from the sale of the debtor's assets available for that purpose. How was such residue to be paid? Necessarily "ratably and in proportion," ~~and~~ in payment or discharge of their said debts. In our opinion the only meaning that can be reasonably attributed to this language is that the residue was to be distributed to the assenting creditors pro rata in accordance with the amounts of their various claims, to be applied pro-



portionately on account toward the payment of same. This being so, it cannot be said that creditors accepting the terms and conditions of the assignment herein thereby agreed to accept such pro rata payments as might be made to them in full settlement of their claims.

While we are impelled to hold that Rainey's assignment for the benefit of his creditors was valid as to all of his creditors, including plaintiff, we do not want to be understood as placing our stamp of approval on instruments of assignment which are couched in language calculated to mislead or deceive unsuspecting creditors. Conditions in assignments for the benefit of creditors, which vitally affect the rights of such creditors, may be drafted in plain, simple language, readily understandable by the ordinary layman, and they should be so drawn.

It is next contended that the transaction by which Rainey transferred his assets to the garnishee was void because it violated the provisions of the Bulk Sales Act. (Chap. 121-1/2, par. 73, et seq., Ill. Rev. Stats. 1941.) It is sufficient answer to this contention to state that where, as here, a valid assignment is made for the benefit of all creditors, it is unnecessary to show compliance with the Bulk Sales Act. In a well considered opinion by Justice O'Connor in Cardiff Gypsum Plaster Company v. Hales Coal & Material Company, 239 Ill. App. 16, the First Division of this court held at pp. 18, 28 and 29:

"The question for decision is whether the Bulk Sales Act applies to the assignment or transfer by a debtor of his goods and chattels to a trustee for the benefit of his creditors.

"\* \* \*

"We are of the opinion that the Bulk Sales Law is not applicable where the stock of goods is transferred for the benefit of all creditors, and the conclusion we have reached is sustained by the following authorities: McAvoy v. Jennings, 44 Wash. 79; Kasper v. Spokane Merchants' Ass'n, 87 Wash. 47; Stovall Co. v. Shepherd Co., 10 Ga. App. 498; Turner v. Drees Hardware & Furniture Co., 207 Mo. App. 567, 227 S. W. 1085; Eldredge Brewing Co. v. Cochecho Bottling Co., 79 N. H. 41; Blanke



Tea & Coffee Co. v. Sargent, 5 Colo. 299."

It is also urged that at the time the summons in garnishment was served upon him the garnishee had in his possession salary due and owing to the principal defendant more than sufficient in amount to pay plaintiff's claim. The summons was served upon the garnishee on February 27, 1939. Greenstein, the garnishee trustee, testified that commencing with the date of the assignment, February 19, 1938, Rainey was employed by him to carry on the undertaking business at a salary of \$50 a week; that he was paid salary at that rate as it accrued until August 26, 1938, when he was paid four weeks salary amounting to \$200 in advance; that thereafter his salary was paid in advance until this cause was tried; and that he, as trustee, did not have in his possession on February 27, 1939, when the garnishment summons was served upon him, any money due as salary to Rainey. The only other evidence presented upon the trial bearing on the question under consideration is a so-called "Uniform Journal" produced by the garnishee. Following is a summary of entries appearing in this "Journal":

"1938		
From 2/19/38		
2/19 to 3/5 @ \$50.00 per week	2 weeks	100.00
* * *	* *	* *
7/23 to 8/20	4 weeks	200.00
8/20 to 9/17	4 "	200.00
9/17 to 10/15	4 "	200.00
* * *	* *	* *
45 Wks. @ 50.00		\$2250.00
1939		
* * *	* *	* *
2/25 to 3/25	4 weeks	200.00
3/25 to 4/22	4 "	200.00

Concerning this book Rainey testified that one O'Brien, another employee of the garnishee, "made a special book for my salary and copied it out of a big book. That is what it is." It will be noted that this "Journal" shows regular successive entries as to Rainey's salary at the rate of \$50 per week from February 19, 1938, until subsequent to February 27, 1939, the



date ~~at~~ the garnishment summons was served upon Greenstein. Of what probative value are these salary entries as against Greenstein's positive testimony that Rainey's salary was always paid in advance subsequent to August 26, 1938? Is there anything about them which indicates when and in what manner Rainey was paid his salary? All that we can glean from said entries is the rate of salary and what it aggregated for designated periods. The trial court evidently found that these entries were entitled to little or no weight as against the positive testimony of the garnishes that Rainey had been paid his salary in advance and that he had no funds in his possession belonging to the principal defendant at the time of the service of the garnishment summons. We are not convinced that the finding of the court in this regard should be disturbed.

For the reasons stated herein the judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Scanlan, P. J., and Friend, J., concur.

XX J.

The first part of the document is a list of names and dates. The names are written in a cursive script, and the dates are in a more formal, printed style. The list appears to be a record of some kind, possibly a ledger or a list of transactions. The names are mostly male, and the dates range from the late 18th century to the early 19th century. The list is organized in a columnar fashion, with names in one column and dates in another. There are some entries that are crossed out or corrected, suggesting that the list was being updated or revised. The overall appearance is that of a historical document, possibly a family record or a business ledger.

The second part of the document is a short paragraph of text. It appears to be a continuation of the list or a summary of the information. The text is written in the same cursive script as the names in the list. It is somewhat difficult to read due to the handwriting, but it seems to contain some information about the individuals listed in the first part. The paragraph is followed by a signature or a set of initials, which may be the name of the person who compiled the list.



41711

THE PEOPLE OF THE STATE  
OF ILLINOIS,

Defendant in Error,

v.

WILLIAM J. ROSS,

Plaintiff in Error.

240  
ERROR TO MUNICIPAL

COURT OF CHICAGO.

312 I.A. 186<sup>2</sup>

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This writ of error is brought by William J. Ross to review a judgment rendered against him on the finding of the trial court that he was guilty of carrying a concealed weapon on his person as charged by the information filed in this cause. He was sentenced to serve ninety days in the county jail and pay a fine of \$100.

The information upon which defendant was tried is as follows:

"John J. Jarecki in his own proper person, comes now here into court, and in the name and by the authority of the People of the State of Illinois, gives the Court to be informed and understand that William J. Ross, 2835 Lincoln Ave. heretofore, to-wit, on the 26th day of May 1940 at the City of Chicago, County of Cook and State of Illinois, aforesaid, intentionally and maliciously did, then and there,

"William J. Ross did then and there unlawfully carry concealed on or about his person a pistol to wit: a 25 cal. colt automatic pistol. That the said William J. Ross at the time was not a sheriff, coroner, constable, policeman, or duly constituted peace officer, or a warden, or a superintendent or keeper of prison, penitentiary, jail or any other institution for the detention of persons accused or convicted of crime nor an employ, or agent engaged in the discharge of any duty as conductor, baggage man, messenger, driver. Watchman, special agent, policeman employed by a railroad or express company or assisting at the time in making an arrest or preserving the peace, or engaged at the time in assisting any such officer while so engaged.

in violation of Paragraph 155 chapter 38 Illinois Revised Statutes 1937, contrary to the form of the statute in such case made and provided and against the peace and dignity of the people of the state of Illinois.

"John J. Jarecki

"Subscribed and sworn to before me this May 28, 1940  
day of \_\_\_\_\_

"Joseph L. Gill,  
"Clerk of the Municipal  
Court of Chicago."

THE STATE OF ILLINOIS,  
COUNTY OF COOK,  
IN SENATE,  
JANUARY 11, 1938.

REPORT OF THE  
COMMISSIONER OF THE  
DEPARTMENT OF CORRECTIONS,  
IN RESPONSE TO A RESOLUTION  
PASSED BY THE SENATE  
ON JANUARY 11, 1938.

TO THE SENATE,  
I have the honor to acknowledge the receipt of your resolution  
of January 11, 1938, and to report to you the results of the  
investigation conducted by the Department of Corrections  
in response to the same.

The investigation was conducted by the Department of Corrections  
in accordance with the provisions of the Act of March 1, 1937,  
which provides for the establishment of a Department of Corrections  
and for the appointment of a Commissioner thereof. The results of  
the investigation are set forth in the accompanying report.

Very respectfully,  
WILLIAM J. WOOD,  
Commissioner of the Department of Corrections.

WILLIAM J. WOOD,  
Commissioner of the Department of Corrections.

Defendant contends that the information upon which he was tried is fatally defective because it was not properly verified. There is no merit in this contention. While it is true that the verification of the information is not in affidavit form, the clerk of the court by his jurat certified that the information was sworn to before him by John J. Jarecki, who was a police officer of the city of Chicago. We think that the language contained in this information is susceptible of only one reasonable construction and that is that the facts were positively set forth therein. Since the clerk of the court certified that the informant swore to the truth of such facts, we are impelled to hold that there was no fatal defect in the information or its verification. Furthermore the record discloses that before leave was granted to file the information Judge William V. Daly of the Municipal court of Chicago "examined the above information and the person presenting the same and have heard evidence thereon, and am satisfied that there is probable cause for filing same."

Defendant next contends that the finding and judgment are contrary to the weight of the evidence.

The record does not contain a transcript of the proceedings in the trial court, but by stipulation there is included in the record an "Agreed Statement of All Facts Material To The Above Cause," the pertinent portions of which are as follows: "The first witness to be called was Frank Ryan, who testified on behalf of the People and on being interrogated by the Assistant State's Attorney and counsel for the defendant, testified substantially as follows:

"My name is Frank Ryan and I live at 2238 W. Madison Street, Chicago, Illinois. I am a member of Local No. 159 of the Sign Hanger's Union. On May 26th, 1940, I phoned my friend, Michael Kearney, and asked him to go with me to visit my sister, who resides in the 4800 block on Hutchinson Avenue,

...not in connection with the ... in which he was  
... is fully satisfied ... it was not properly verified.  
There is no merit in this contention. While it is true that the  
verification of the information is not a ... the  
clerk of the court ... the information  
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contained in this information is a ... of ... person-  
able consideration ... in the ... positively set  
forth therein. ... the ... the  
informant ... the ... the ...  
hold that there was no ... in the information on its  
verification. ... the ... the ...  
was granted to ... the ... the ...  
Municipal court of ... the ... the ...  
person presenting the ... and have ... evidence thereon, and  
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Cause," the pertinent portions of which are as follows: "The  
first witness to be called was Frank Ryan, who testified on  
behalf of the people and on being interrogated by the defendant  
State's Attorney ... the defendant, testified sub-  
stantially as follows:  
"My name is Frank Ryan and I live at ...  
Street, Chicago, Illinois. I am a member of Local No. 139 of the  
Sign Makers' Union. On May 10th, 1940, I phoned my friend,  
Michael Keeney, and asked him to go with me to visit my sister,  
who resides in the 4800 block on Hutchinson Avenue."

"Mr. Kearney came over to my home and we got into my car and started for the home of my sister. We drove West on Madison Street to Kedzie Avenue and there we saw, James Duffy, a fellow member of Local 159. I invited him to come along and the three of us drove West to Cicero and then North on Cicero to the intersection of Milwaukee Avenue. Near this intersection is located Straus and Schram Furniture store. The address is 4025 Milwaukee Avenue.

"We saw some one working on a large sign. Because it was Sunday, we decided to ask them how it was that they were working on Sunday or if they were members of the Union. We got out of the car and Michael Kearney spoke to a heavy set man who appeared to be in charge and whom I now recognize as William J. Ross, the defendant in this case.

"Michael Kearney asked Ross how it was they were working on Sunday and if they were members of the Union and if he could see his Union Card. The men then started to fight with us.

"Mr. Michael Kearney, the next witness called on behalf of The People, corroborated the above testimony of Frank Ryan and then proceeded as follows:

"Then I went up to the heavy set man whom I now identify as William J. Ross and spoke to him about the reason for their working on Sunday and inquired whether or not he had a Union Card, he thereupon started arguing with me using profane language and that Ross thereupon put his right hand into his right front pants' pocket and withdrew a pistol concealed therein and struck me in the face with it, saying 'Here is my Union Card.'

"That thereupon the other men who were working on the job with Ross took part and then Ryan and Duffy came to my assistance. Shortly after that a uniformed Policeman of the City of Chicago came upon the scene.

"This all happened in the City of Chicago, County of Cook and State of Illinois.



"It was thereupon agreed by and between the parties in interest and their respective attorneys, that James Duffy, who was then present in court, would, if called as a witness, substantiate the testimony given by Mr. Ryan and Michael Kearney upon the hearing.

"The next witness to be called on behalf of the People was Alfred C. Dettman, who testified in substance as follows:

"My name is Alfred C. Dettman, I reside at 4920 North Lester Avenue, Chicago, Illinois, and am a police officer assigned to the Traffic Division of the Chicago Police Department. On Sunday morning, May 26th, 1940 at or about 10:50 A. M. I was stationed at the corner of Irving Park, Cicero and Milwaukee Avenues. Outside of a cigar store on the North West Corner, when a dark heavy set man, whom I now recognize as William J. Ross ran up to me and told me that some men and four of his employees were fighting in front of the Straus and Schram Furniture Store.

"I went over to the scene of the altercation. When I arrived I saw men, whom I now recognize as James Duffy, Michael Kearney and Frank Ryan, who were struggling with the men I now recognize as Edward Bartelt, Verne Simmons, Edward Smith and Ralph Guy.

"Another Police Officer of the City of Chicago John Jarecki came up and we stopped the fight. During the struggling, I saw a pistol in the hand of William J. Ross. I don't know where he obtained it. After stopping any further fighting I asked the defendant Ross for the gun. He told me he had put it in the truck. We went over to the truck and he took it from underneath a cushion and gave it to me. It was the same gun he had in his hand.

"At this time a 25 Calibre Colt Automatic Pistol, serial No. 243100 with 1 shell in the chamber and 1 clip of 6 shells

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inserted in the magazine was identified by the witness Alfred G. Dettman and the same was offered and received in evidence as the People's Exhibit 1. This all happened in the City of Chicago, County of Cook and State of Illinois.

"It was stipulated that if Officer Jarecki was called as a witness his testimony would be substantially the same as Officer Dettman. Whereupon the People rested.

"The defendant William J. Ross then testified in his own behalf as follows:

"My name is William J. Ross, am married and reside with my wife and two children at 2833 North Lincoln Avenue. I am General Manager of the Chief Sign Company, Inc. On Sunday, May 26th, 1940 at about the hour of 9:00 o'clock A. M. I left my home in company with one of our workers and drove to Straus and Schram Furniture Company store at 4026 Milwaukee Avenue in my car where we were to remove a large sign. When we arrived there, we found three of our men on the job. They were Edward Bartelt, Edward Smith and Ralph Guy.. It was necessary for us to work on Sunday because of the contract with Strauss and Schram. The sign was to be completely removed by Monday night. After I had been working with my men for an hour or so an automobile drove up and stopped and three men, Frank Ryan, James Duffy and Michael Kearney got out of the car and came up to us using profane language and then ordered my men off the job. Duffy threw over one of the ladders while Ryan took a chisel and began to break a section of the sign which lay on the sidewalk and the window of my truck. Kearney and Ryan then dumped everything out of the truck, tore the seat cushion and flung them together with the contents on the ground.

"I ran to the cigar store on the North West Corner of Cicero and Irving Park Ave., I bought a slug and called the police. When I came out I saw a policeman and took him to the scene of the fighting. When we got there we found about fifteen men, members



of the Sign Hanger's Union all attacking our four men. Ralph Guy was lying on the street being trampled upon and beaten. A large crowd had gathered there. Some one said 'Help that man!' I went to his aid and as I did so Ryan charged at me and koncked me over that part of the sign lying on the walk. There was a gun on the sidewalk which Kearney and Ryan had taken out of our truck and threw upon the sidewalk. I picked up the gun and then I threw the gun into the truck. Later I told one of the police officers where the gun was and I got it and gave it to him. At no time did I have a gun or other weapon concealed upon or about my person.

"It was thereupon stipulated by and between all the parties by their respective attorneys that if Edward Bartelt, Edward Smith, Verne Simmons and Ralph Guy were called as witnesses, their testimony would in substance be the same as was given by the defendant William J. Ross.

"Officer Dettman called by the People as a rebuttal witness testified that there was not more than fifteen men engaged in the struggle with the defendant Ross and his four helpers; but that the only men engaged in the altercation were Ryan, Kearney, Duffy and the defendant Ross with his four helpers.

"Officer Dettman further testified that he saw no tools, seat cushion or other contents of the truck lying on the ground or sidewalk. That there was a crack in the window but that he could not determine whether it was an old crack or one of recent origin."

A rather unusual situation is presented not only by the facts adduced in evidence but by the failure of the State's attorney and the attorney for the defendant to present at the trial the testimony of at least six eyewitnesses of the altercation which resulted in the filing of the information against defendant. At least one of these witnesses was actually present in the court room and there was no showing that the others were not available.

Just what is the factual picture? Three members of the Sign Hangers Union, Ryan, Kearney and Duffy, saw men working

of the... was... ground... to his... that... this... gun into the... the gun was... a gun on... "The... by their... Vorne... mory... "The... next... the... the only... and the... "The... seat... sideways... not... "The... faces... and the... testimony... resulted... least one of... room and... that...

on a sign at 4025 Milwaukee avenue on Sunday, May 26, 1940. They stopped their car in front of said building and got out. According to Ryan, Kearney immediately accosted the defendant, Ross, who was the general manager of the firm whose employees were removing the sign, and asked him "how it was they were working on Sunday and if they were members of the Union and if he could see his Union Card \*\*\* The men then started to fight with us." Ryan did not see the defendant either draw or display a pistol.

As heretofore shown, Kearney testified that when he asked the defendant why his men were working on Sunday and whether he had a "Union Card," Ross used "profane language" and "thereupon put his right hand into his right front pants' pocket and withdrew a pistol concealed therein and struck me in the face with it, saying, 'Here is my Union Card;'" and that then a general fight ensued between the witness and his associates and the defendant and the men working on the job.

Officer Dettman testified that it was the defendant who ran up to him where he was stationed some distance away and reported the trouble; that when he arrived on the scene, he saw Ryan, Kearney and Duffy fighting with the four men who had been working on the sign; that he and Officer Jarecki stopped the fight; that "during the struggle I saw a pistol in the hand of William J. Ross;" and that when he asked Ross for the gun, the latter took it from underneath a cushion and gave it to him.

As has been noted, it was stipulated that if Officer Jarecki was called as a witness, his testimony would have been substantially the same as that of Officer Dettman, and that if Duffy had been called as a witness, his testimony would have been substantially the same as that "given by Mr. Ryan and Michael Kearney."

According to the defendant, "Frank Ryan, James Duffy and Michael Kearney got out of the car and came up to us using profane language and then ordered my men off the job. Duffy threw over one

on a night... stopped... to... the General... them, and... they were... and... in... and... the... had a "Union... put his... a... 'Here is my... between the... men... the... ran up to... the... and... sign... the... that... next... was... she... called... the... Michael... language...

of the ladders while Ryan took a chisel and began to break a section of the sign which lay on the sidewalk and the window of my truck \*\*\* then dumped everything out of the truck, tore the seat covers and flung them together with the contents on the ground;" that he ran to a cigar store some distance away and telephoned the police; that when he came out of the cigar store he saw Officer Dettman and took him back with him to the scene of the fighting; that he did not at any time have a gun concealed on or about his person; that there had been a gun in his truck that Kearney and Ryan had taken therefrom and thrown on the sidewalk; and that he picked this gun up, threw it into the truck and later gave it to the police officer.

As has been shown it was also stipulated that if the four men who were working on the sign were called as witnesses, "their testimony would in substance be the same as was given by the defendant, William J. Ross."

The essence of the crime charged by the information is the concealment of the weapon upon the person of the defendant. Kearney, who was apparently the leader of the squad which provoked the altercation and fighting, was the only witness who testified to the concealment of the pistol on defendant's person. Ryan saw no gun at all. The stipulation as to Duffy's testimony was that it would have been substantially the same as that given by both Ryan and Kearney. It could not have been the same as the testimony of both Ryan and Kearney. Kearney said he saw Ross withdraw the concealed weapon from his pocket. Ryan said he saw no gun, either concealed on defendant's person or in defendant's possession. Police officer Dettman's testimony that he saw a gun in defendant's hand does not even tend to corroborate Kearney's testimony as to the concealment of the pistol because Kearney stated that the defendant drew the gun from its place of concealment immediately upon his arrival and Officer Dettman did not arrive on the scene until he was brought there by Ross.





The fact that the defendant ran to telephone the police at the very onset of the trouble clearly indicates that he was a man of peaceful tendencies. So does the fact that he brought the police officer back with him to stop the fight. His very first thought when he and the men working under him were threatened with violence was to seek the protection of the police. Defendant's conduct in this regard is hardly compatible with Kearney's statement that he drew a gun before he went to summon the police. It is much more logical and probable that if Ross had a gun and drew it, he could have dominated the situation and driven his assailants off without having to call the police for protection.

In our opinion the trial of this cause was conducted in an unsatisfactory manner. The defendant's liberty was at stake and it cannot be said that he was given a fair trial when the evidence of eyewitnesses of the occurrence was presented by stipulation instead of by their testimony in open court, especially when they were available. But even on the record before us defendant's guilt was not shown beyond a reasonable doubt. Kearney, the leader of the aggressors, was the only witness who testified that the defendant carried a concealed weapon on his person. Neither of his associates corroborated him in this respect. Ross testified positively that he did not have a pistol on his person, concealed or otherwise, and his testimony was corroborated by the stipulated testimony of the four men who were working under him, whose testimony must be considered just as positive, that Ross did not carry a pistol concealed upon his person.

While the rule is that a conviction may be had on the testimony of one witness where the jury or the trial court trying the case without a jury believes such witness, and while it is also the rule that the finding of the trial court or the verdict of a jury is conclusive as to the credibility of witnesses and the weight of their testimony, these rules are applicable in criminal cases only where the evidence is clear and convincing. The rule is truly expressed



in People v. Tobin, 369 Ill. 73, where the court said at p. 78:

"The finding of the trial court is conclusive as to the credibility of witnesses and the weight of their testimony, where the evidence is clear and convincing." In People v. Hooper, 364 Ill. 320, the court said at p. 325: "Although we are committed to the doctrine that the jury are the judges of the facts and the weight of the evidence in all criminal cases, yet, if a review of the evidence and a consideration of the entire record leaves us with a grave and serious doubt of the guilt of the accused it is our duty to reverse the judgment."

A review of the evidence and a consideration of the entire record in this case leaves us with a grave and serious doubt of the guilt of the accused.

The judgment of the Criminal court of Cook county is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

Scanlan, P. J., and Friend, J., concur.



41749

PEOPLE OF THE STATE OF ILLINOIS,  
ex rel. CARL G. ANDERSON,  
Appellee,

v.

CITY OF CHICAGO, a Municipal  
corporation, et al.,  
Appellants.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

312 I.A. 187

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal is brought by the defendants, City of Chicago and certain of its officials (hereinafter for convenience sometimes referred to collectively as the city), to reverse a judgment entered in favor of plaintiff, Carl G. Anderson, for the issuance of a writ of mandamus compelling the defendants to issue a license to said plaintiff to operate a massage parlor. The case was heard by the trial court without a jury and there is no question raised on the pleadings. Plaintiff did not file a brief in this court.

On September 26, 1940, John Nolan, a police officer of the city of Chicago assigned to the office of the commissioner of police, visited the massage parlor conducted by plaintiff in the State-Lake Building, Chicago, and as the result of a report made by him concerning such visit plaintiff's license to operate the massage parlor was revoked by the mayor on October 4, 1940.

Plaintiff instituted a mandamus proceeding to compel the restoration of his license for the year 1940, but before the hearings were concluded in that proceeding the 1940 license period had expired and the cause was dismissed. On January 3, 1941, plaintiff applied for a license for 1941 and his application was not approved. He then instituted the instant proceeding on January 21, 1941, for a writ of mandamus to compel the issuance of a license to him for the year 1941.

Upon the hearing plaintiff testified that he had operated a passage parlor in the State-Lake Building for twenty years; that he was a chiropodist as well as a masseur; that 10% of his business

1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

... ..

came from the practice of chiropody and the other 90% from the operation of the massage parlor; that on September 24, 1940, he had in his employ three female operators, who gave massage treatments to both men and women patients; that he had as patients a number of public officials, theatrical people, orchestra leaders and others; and that he did not on September 24, 1940, or at any other time see any immoral or improper conduct on his premises. Several witnesses testified that plaintiff was generally reputed to be a man of good moral character and others testified that on the occasion of their visits to his place of business they saw no immoral or improper conduct.

Officer Nolan testified in substance that when he entered the reception room of plaintiff's premises on September 26, 1940, he was met by one Hilda Carlson, a masseuse employed by Anderson; that she conducted him to a private room and requested him to undress; that after he had completely disrobed he got on the massage table and she proceeded to massage him; that the masseuse then performed numerous lewd and lascivious acts upon and about his body as well as her own and made immoral advances to him; and that after he had dressed himself he called in some other police officers who had been stationed in the hall and arrested Anderson, Hilda Carlson and two other female operators, all of whom were thereafter discharged when their cases came on for hearing in the Municipal court.

Julius Melegh, an investigator for the Committee of Fifteen, testified that he visited plaintiff's massage parlor on July 26, 1940; that when he entered the premises Hilda Carlson, the same masseuse referred to by Nolan, led him into a private room; that she then asked him if he had any "rubbers" and stated that she would give him a "good time" if he would stay; and that he left the premises and made a report of his investigation to the Committee of Fifteen.





Hilda Carlson denied Melegh's testimony and stated that she had no recollection of ever having seen him. She also denied in detail the acts of indecency testified to by Officer Nolan.

The city's theory is that the mayor properly refused to issue a massage parlor license to plaintiff for the year 1941 because of the immoral and unlawful manner in which he operated his business in 1940, resulting in the revocation of his license for that year.

The Municipal Code of Chicago contains the following pertinent provisions:

"No person shall conduct or operate a massage parlor without first obtaining a license therefor." (Section 152-2.)

"In all cases where licenses are required to be procured, such licenses shall be granted by the Mayor \*\*\*." (Section 101-2.)

"The Mayor shall have power to revoke any license issued under the provisions of this code for good and sufficient cause." (Section 101-27.)

"\* \* \* Moral supervision of massage parlors shall be directed by the Commissioner of Police." (Section 152-7.)

The Mayor of the City of Chicago has a broad discretion in the granting and revoking of massage parlor licenses. It is a well recognized principle of law that there is vested in the licensing authority a discretionary power which may be reasonably exercised in the granting or refusing to issue a license. Even when the applicant for a license has complied with all of the requirements governing the issuance of such license, nevertheless a discretion exists in the licensing officer and he will not be compelled to issue a license when in his discretion, reasonably and fairly exercised, the license has been refused. (Harrison v. The People, 222 Ill. 150; People v. Dever, 236 Ill. App. 135.)

The fact that plaintiff and his employees were discharged in the Municipal court when they were tried on charges brought against them as the result of the investigation made by the Police Department did not militate against the Mayor's use of his discretionary power to refuse to grant a license to Carlson. The

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judgment in the criminal proceeding did not preclude the Mayor from exercising his discretionary power in the matter of refusing to grant Carlson a license for the year 1941. (People v. Ludwig, 258 Ill. App. 268; State v. Lewis, 164 Wis. 363.)

Did the Mayor abuse his discretion by refusing plaintiff a massage parlor license for the year 1941? When the report of Officer Nolan and his testimony and that of the investigator Melegh are considered in connection with the admitted fact that it was the common practice in the conduct of plaintiff's business for female attendants to massage male patrons, it must be held that the Mayor exercised sound discretion, both in revoking plaintiff's 1940 license and in refusing to issue a 1941 license to him. It clearly appears that there was good and sufficient cause for the revocation of plaintiff's 1940 license and it just as clearly appears that the Mayor's refusal to grant plaintiff a license for 1941 was neither unreasonable, arbitrary nor capricious. In McGregor v. Miller, 324 Ill. 113, in enunciating the principles of law applicable to a mandamus action brought to compel an officer to perform a discretionary function, the court said at p. 118:

"It is a well recognized rule that where the performance of an official duty or act involves the exercise of judgment or discretion the officer cannot ordinarily be controlled with respect to the particular action he will take in the matter, and where an officer, in the exercise of a discretionary power, has considered and determined what his course of action is to be he has exercised his discretion, and his action is not subject to review or control by mandamus; and so careful are the courts of encroaching in any manner upon the discretionary powers of public officials, that if any reasonable doubt exists as to the question of discretion or want of discretion they will hesitate to interfere, preferring rather to extend the benefit of the doubt in favor of the officer." (To the same effect are City of Chicago v. Kirkland, 79 F. 2nd 963; People v. Schuettler, 209 Ill. App. 588; Coughlin v. Chicago Park District, 364 Ill. 90.)

Plaintiff having failed to show an abuse of discretion by the mayor and having also failed to establish a clear right to the writ of mandamus, the judgment of the Circuit court is reversed.  
JUDGMENT REVERSED.

Scanlan, P. J., and Friend, J., concur.



312 Ill. App.  
Adv. Pt 2

41716

WILLIAM HOLDEN,  
Appellant,

v.

DR. SAMUEL STEIN,  
Appellee.

APPEAL FROM

SUPERIOR COURT, COOK COUNTY.

312 I.A. 260

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging malpractice by the defendant doctor in his treatment of an injury to plaintiff's leg. At the conclusion of evidence on behalf of plaintiff the court directed the jury to return a verdict for defendant, and plaintiff appeals from the judgment entered on the verdict.

In December, 1935, plaintiff was hit by an automobile, suffering shock, laceration of the scalp and a fracture of the left leg, involving the tibia and fibula; he was taken to the South Chicago Community Hospital where he was treated by the defendant. First the shock and head injuries were treated and the leg bandaged and put in a splint. X-rays showed the fracture to be a comminuted one, with loose fragments of bone. Plaintiff was treated by defendant for the fractured leg for approximately four months.

Plaintiff testified that at the end of this time defendant removed the cast and said that the leg was solid and could be used. The union of the fractured bones did not proceed in a satisfactory way, and a Dr. Kreuscher, who specialized in bone and joint surgery, operated on plaintiff. He performed what he called a "sliding graft of bone;" that is, he took a piece of healthy bone from above the fracture, slid it across the fracture, thus uniting the fragments.

Dr. Kreuscher testified that the reason for the non-union was not due to anything that defendant did or omitted to

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do, but was the result of the original injury; that in a comminuted fracture the nutrient artery is disturbed or ruptured and there is apt to be a delay or even a failure of bony union. On cross-examination the witness said that this delayed union occurs "regardless of the care and skill used by the physician originally setting the bone." He further testified that defendant had used good judgment in the method of alignment and the management of plaintiff's leg.

Plaintiff also produced a Dr. Solar, who in answer to a hypothetical question said that in his opinion "the treatment by the first physician to the hypothetical person did not exercise complete reasonable diligent care," and also said that in his opinion "with reasonable medical certainty there might or could have been a causal connection between the subsequent events that followed the first doctor's treatment and the condition of the leg before Dr. Kreuscher operated."

Plaintiff first argues that it was error to permit the cross-examination of Dr. Kreuscher, who was called as a witness on behalf of the plaintiff. The latitude allowed in cross-examination rests largely in the discretion of the trial court. Brennen v. Carterville Coal Co., 241 Ill. 610, 622. In Chicago City Ry. Co. v. Creech, 207 Ill. 400, it was held to be erroneous for the trial court to restrict the cross-examination so as to prevent the party from going only into matters connected with the examination in chief. And in People v. Del Prete, 364 Ill. 376, 380, it was held that cross-examination must be permitted as a matter of right "so far as it relates to facts in issue or facts relevant to the issue." There are many other cases to the same effect.

Cases cited by plaintiff are not in conflict with this rule. In Bell v. Prewitt, 62 Ill. 361, it was held that the facts

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Figure 6. The effect of the initial concentration of the monomer on the polymerization rate.



brought out on cross-examination were wholly inadmissible. In the instant case plaintiff's whole theory was that he had been improperly treated by the defendant, and the testimony of Dr. Kreuscher as to the facts was admissible and proper to be developed under cross-examination.

The rule with reference to the treatment by a physician is that he is bound to exercise reasonable skill such as physicians in good practice ordinarily use in a similar case in the same locality. Schireson v. Walsh, 354 Ill. 40, 57. Dr. Solar's answer that "the treatment \* did not exercise complete reasonable diligent care," is meaningless, and his opinion that there "might or could have been a causal connection between the subsequent events that followed the first doctor's treatment and the condition of the leg before Dr. Kreuscher operated," is obscure and fails to state any facts as to what defendant did or omitted to do that was malpractice and produced harmful results.

In Sims v. Parker, 41 Ill. App. 284, it was said that in order to hold a physician liable for malpractice it must be shown that he failed to exercise ordinary skill and care in the treatment of a given case, and that "The jury cannot draw the conclusion of unskillfulness from proof of what the result of the treatment was...." In Moline v. Christie, 180 Ill. App. 334, the opinion goes extensively into the decisions on this point. It cites Haire v. Reese, 7 Phil. R. 138, as follows: "No presumption of the absence of proper skill and attention arises from the mere fact that the patient does not recover, or that a cure was not effected." In Pettigrew v. Lewis, 46 Kan. 78, it was said: "The question whether a surgical operation has been unskillfully performed or not is one of science...." And in Martin v. Courtney, 87 Minn. 197, 204, the court, in sustaining

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a directed verdict in favor of the defendant, said: "...mere conjecture or supposition should not be sufficient to overcome the presumption in favor of the attending physician. Where the submission of important facts necessary to sustain a verdict rests on conjecture or suspicion alone, it should not be said in any enlightened tribunal that it could reasonably sustain a verdict. 'Mere possibilities can never establish the probability of a fact requisite to be proved in order to make \*\* a party liable in any action whatever. To decide otherwise would be to say that verdicts may rest on mere possibility, speculation, and conjecture.' " The Moline case involved an infected finger, and the opinion concludes: "Our conclusion is that the plaintiff's evidence left the important questions of fact in the realm of possibilities, speculation and conjecture. The jury had no basis in the evidence upon which to found the necessary conclusions of fact. Under the authorities cited above, the evidence was not sufficient to carry the case to the jury, and the trial court did not err in directing a verdict."

It was incumbent upon the plaintiff to prove that the delayed union of the fractures in his leg was due to and caused by negligent treatment given by the defendant, and in this respect plaintiff failed. Phebus v. Mather, 181 Ill. App. 274; Wallace v. Yudelson, 244 Ill. App. 320, 327-8; Goodman v. Bigler, 133 Ill. App. 301; and Moline v. Christie, 180 Ill. App. 334.

The testimony of Dr. Solar did not purport to state how, in anything defendant did, he did not exercise that ordinary degree of skill and care which a physician similarly situated would exercise, and that is the only standard which measures a physician's responsibility and liability.

It also should be noted that Dr. Solar, while he said



that he did not consider the opinion of Dr. Kreuscher "completely," yet also testified that he did not take issue with Dr. Kreuscher on the fact that Kreuscher had thought "that the doctor (defendant) exercised good judgment in the method of aligning the fracture and in the method and management up to that time" (when Dr. Kreuscher saw plaintiff.)

A case involving similar facts is Wright v. Conway 241 P. (Wyo.) 369, 378, where the court, speaking of the failure of bones to unite following a fracture, said: "Failure to secure a union during the period of that treatment, or even longer had it been continued, would not, alone, establish negligence, or even be a ground for an inference thereof, since a successful result is not guaranteed, and the general rule is that an unsuccessful result does not, alone, establish negligence, or justify an inference thereof. That rule was applied in a case directly in point (Dean v. Seeman, 42 S. D. 577, 176 N. W. 649), where the court said: 'It may be stated in the beginning that the mere fact that the broken bone did not stay in place after it had been set and did not grow together in the usual length of time does not necessarily prove, nor even imply, that appellant was negligent or unskillful.' " Another case involving similar facts is Ferguson v. Glenn, 201 N. C. 128, 133, a suit for malpractice where the fractured bones failed to unite. In that case the doctors testified that fractured bones unite because of what is called "callous," or a kind of exudation that comes from the ends of the bones and causes a knitting together of the fractured parts, and that if there is not sufficient callous thrown out they fail to unite. The court there held that the trial court should have directed a verdict for the defendant, and that if the doctor has



applied in his treatment such knowledge and skill as are ordinarily possessed by men in his profession similarly situated, he has fully measured up to these requirements of the law and "he cannot be held liable for consequences which no human agency can ordinarily prevent."

Dr. Kreuscher testified that nature usually unites the fractures by throwing a callous across, and that if enough callous is thrown out the fracture should heal; that such callous does not always form, and that because of the failure in this respect the doctor was of the opinion the operation of bridging the fracture with a graft of bone was necessary. There is no evidence that defendant was responsible for the failure of callous to form in the instant case.

Counsel for plaintiff correctly state the rule that in considering the motion for a directed verdict the court should not weigh the testimony of the witnesses and decide which is the most credible. In the instant case the court did not weigh the testimony but properly held there was no evidence to sustain plaintiff's claim of improper treatment by defendant, and especially the claim that such alleged improper treatment caused the delayed union of the fractured bones. As was said in Kanne v. Metropolitan Life Ins. Co., 310 Ill. App. 524, 531: "It is true we cannot weigh conflicting evidence. However, it is our duty to review the testimony and determine whether there is any evidence to weigh." There is none here for the present plaintiff, and the directed verdict for the defendant was proper and the judgment is affirmed.

AFFIRMED.

Matchett, and O'Connor, J. J., concur.





41726  
JOSEPHINE RASHINSKI,  
Appellee,

v.

THE TRAVELERS CASUALTY INSURANCE  
COMPANY,  
Appellant.

4211  
APPEAL FROM

COUNTY COURT COOK COUNTY.

312 I.A. 260<sup>2</sup>

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment against it of \$1,000, entered on verdict returned in an action by plaintiff to recover on one of defendant's insurance policies in which she was the beneficiary.

The insured was Lawrence Rashinski, the son of plaintiff. The policy provided for payments for specific injuries and \$1,000 for loss of life caused by accident. Lawrence was in an automobile accident on March 17, 1940, and died March 23; proofs of death were submitted to defendant, who declined to pay, asserting that the policy had lapsed for failure by the insured to pay the premiums for February and March, 1940.

The policy called for the payment of monthly premiums of \$1, payable on the first day of each month. Defendant says that under the terms of the policy, when a premium is not paid on the day it is due the policy, ipso facto, becomes canceled and void.

Plaintiff introduced evidence that on February 27 the aunt of the insured, Mrs. Jamelunas, called at the defendant's office in Chicago and had an interview with Edwin A. Graw, who was the duly authorized agent of the defendant to represent it in the business of insurance in Illinois. Although Graw denies that he had any conversation with Mrs. Jamelunas, the jury could properly believe that she told him that the insured was hard up for



cash and could probably pay the February premium around the middle of March if they would give him a little extension; that Graw stated to her that though this was unusual, the defendant company would grant this extension. A few days later the insured received a notice from the defendant company entitled "Final Notice," saying that to avoid suspension, payment of premiums must be made on or before the due date, which the notice stated was March 30, 1940.

March 19 the insured forwarded funds by money order to pay the February and March premiums, which was retained by defendant until after notice of the death on March 23 of the insured had been given to the defendant. Defendant thereupon on March 29 wrote to plaintiff that the policy had lapsed on March 1, 1940, and returned the money order.

It is well settled by many cases in this state that where an insurance company induces the insured to believe that payment of the premium may be made after the due date, a forfeiture is barred where the payment is made before the last day of the extended period. Baxter v. Metropolitan Life Ins. Co., 318 Ill. 369; Stevenson v. Prudential Ins. Co., 308 Ill. App. 401, 408; Hooker v. Farmers Mut. Reinsurance Co., 304 Ill. App. 230; Chicago Life Ins. Co. v. Warner, 80 Ill. 410. In the Stevenson case, supra., the beneficiary was notified that unless the premium was paid by a certain date the policy would be forfeited, but the company declared a forfeiture before that date; we held that the beneficiary "had no way of knowing that the policy would be forfeited before September 16, as the notice stated, nor could she know that the company would contend the policy was forfeited and void for non-payment of the June premium..." We quoted from the Baxter case: "Forfeiture of life insurance policies is not

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avored, and unless the circumstances show a clear intention to claim a forfeiture for non-payment of the premium such forfeiture will not be enforced. If the conduct of the insurer is such as to induce the assured to believe that a forfeiture will not be insisted upon, the insurer will be held to be estopped from taking advantage of such forfeiture..."

The insured in the instant case could have no reason to believe from the language of the final notice, giving March 30 as the due date, that an attempt would be made to forfeit the policy before that date. The notice was a clear statement by the defendant that the insured, "to avoid suspension," must pay the premium on or before March 30, 1940. Language could hardly be clearer. Even if this were not so, where there is any ambiguity or conflict in the language, courts will construe the policy most favorably to the insured. Levinson v. Fidelity & Casualty Co., 348 Ill. 495.

It is <sup>not</sup> without significance that, while the funds in payment of the February and March premiums were forwarded to the defendant on the 19th of March, they were retained by it and not returned until defendant had received notice of the insured's death. In Froehler v. North American Life Ins. Co., 374 Ill. 17, where the insured forwarded money to pay the premium and the company kept this until after the insured had died, which was 13 days after the money was forwarded, it was held that the insurance company could not hold the money and decline to reinstate the policy when it discovered that the insured was at the point of death. So here, it is a reasonable presumption that the defendant would have accepted the payment of the February and March premiums if it had not learned that the insured had died.

Defendant cites Muller v. Equitable Life Assur. Soc.,

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293 Ill. App. 555, but there the insured did nothing about his defaulted premium until after he was injured, and in his application for reinstatement recited that his policy had lapsed. In Busta v. Court of Honor, 172 Ill. App. 71, there was no request for the extension of time to pay dues, which in the present case was made before the insured was injured. Other cases cited by defendant may be distinguished.

We find no reversible error in instruction No. 2, given at the request of plaintiff. Counsel for defendant seems to concede that it is a correct enunciation of the law but says it tended to mislead the jury, but in what respect is not designated.

The jury could properly believe that defendant's agent, Mr. Graw, agreed with the insured's representative, Mrs. Jamelunas, that the time of payment of the February and March premiums would be extended, and in view of the written notice from the defendant that the premium could be paid on or before March 30, 1940, the verdict was amply supported by the evidence, and, no reversible errors occurring upon the trial, the judgment is affirmed.

AFFIRMED.

Matchett, and O'Connor, J. J., concur.





41736

WILLIAM T. HANSON,  
Appellee,

v.

TRUST COMPANY OF CHICAGO, a  
corporation, Administrator of  
the Estate of Edward Maskell,  
Deceased,

Appellant.

APPEAL FROM

SUPERIOR COURT COOK COUNTY.

3121A.261

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$2,000 had by plaintiff on a verdict in a personal injury case in which plaintiff claims that while riding in a Studebaker automobile it was struck by a Ford automobile which Edward Maskell was driving. In the collision Maskell was killed and suit was brought against his administrator. Mr. Dooling was riding with him in the Ford at the time, and he also was killed.

The accident happened about 2:30 o'clock in the morning of May 21, 1939, at the intersection of Narragansett avenue, which runs south, and Belmont avenue, running east. Plaintiff Hanson was riding in the front seat of the Studebaker car, which was driven by Joseph Scheer, going east on Belmont; the wives of the men were riding in the rear seat; the Ford, driven by Maskell, south bound on Narragansett, collided with the east bound Studebaker at the intersection. At this point Narragansett does not cross Belmont on a straight north and south line. As you enter Belmont, going south on Narragansett, you turn to the east on Belmont about 30 feet and then turn to the right to proceed south on Narragansett. The collision occurred when the Studebaker was about 10 feet west of the center line of Narragansett, as it proceeds southward, and the Ford, coming from the north, turned towards the southeast on Belmont to make the turn



into southbound Narragansett avenue. Both streets are about 45 feet in width and there were the usual red and green lights operating at the intersection.

There is conflicting evidence on the critical point as to which automobile was entitled to the right of way. The plaintiff was not permitted to testify against the defendant administrator. The other three occupants of the Studebaker - Joseph Scheer, his wife Frances, and plaintiff's wife, Mrs. Hanson, each testified that they were travelling from 20 to 25 miles an hour on Belmont as they approached Narragansett; that at this time the intersection light was red and their car slowed down and stopped about even with the red light on the southwest corner and stood there about a minute; the car was in the lane nearest the south sidewalk; another car was moving beside them on the left and it, also, stopped at the intersection with Narragansett, but when the amber light went on it went on eastward across Narragansett; when the Studebaker car started, the light was green; at this time the other car on the left was almost across Narragansett, headed straight east.

These witnesses testified that the Ford car, coming from the north on Narragansett, turned southeast in Belmont and struck the left front of the Studebaker with a heavy crash and careened off toward the north and landed up against a trolley pole. The impact threw Scheer out of the Studebaker to the north, and plaintiff Hanson was half in the street and half in the car, on the left hand side where Scheer had been sitting.

The occupants of the Studebaker were returning from a party in Forest Park, and defendant's counsel sought to develop that at this party the driver and the others had been drinking, the inference being that Scheer was negligent in driving the car

into a building, and the other two were  
 left in the street. The first of these  
 was a man of about 40 years of age.

He was wearing a dark suit and a  
 hat. He was walking towards the building  
 which was situated on the left side of the

avenue. The second man was a man of about  
 30 years of age. He was wearing a light  
 colored suit and a hat.

He was walking towards the building which  
 was situated on the right side of the  
 avenue. The third man was a man of about  
 20 years of age. He was wearing a dark  
 suit and a hat.

He was walking towards the building which  
 was situated on the left side of the  
 avenue. The fourth man was a man of about  
 10 years of age. He was wearing a light  
 colored suit and a hat.

He was walking towards the building which  
 was situated on the right side of the  
 avenue. The fifth man was a man of about  
 5 years of age. He was wearing a dark  
 suit and a hat.

He was walking towards the building which  
 was situated on the left side of the  
 avenue. The sixth man was a man of about  
 4 years of age. He was wearing a light  
 colored suit and a hat.

He was walking towards the building which  
 was situated on the right side of the  
 avenue. The seventh man was a man of about  
 3 years of age. He was wearing a dark  
 suit and a hat.

He was walking towards the building which  
 was situated on the left side of the  
 avenue. The eighth man was a man of about  
 2 years of age. He was wearing a light  
 colored suit and a hat.

He was walking towards the building which  
 was situated on the right side of the  
 avenue. The ninth man was a man of about  
 1 year of age. He was wearing a dark  
 suit and a hat.

and the others were indifferent. There was also some testimony tending to show that the women were asleep at the time of the collision, and hence were ignorant of the movements of either or both of the cars. The women, however, testified denying that they were asleep at the time of the accident; there was evidence of some slight drinking while they were at the party, but a considerable time before they started homeward.

Defendant introduced evidence tending to show that the red light was against the Studebaker as it approached Narragansett. Peter Feyereisen and Anson Cranmer were returning from a dance, travelling south on Narragansett, and when about 900 feet north of Belmont heard a crash and saw the light at the intersection turn from amber to red, and it is argued that at the time of the collision the green light was on for the southbound Ford. There were some discrepancies in their testimony. Apparently they had signed a statement prior to the trial, describing the accident, in which they said that a car travelled south past them as they neared Belmont at a great rate of speed. Cranmer, however, testified that he did not know which car had the right of way at the time of the accident and did not know that the light showed green at this time.

A milk driver, Elmer Essig, testified that he was standing on Nagle avenue, which is a block west of and parallel to Narragansett, with his car headed north; that the Studebaker passed him, going east on Belmont at about 40 to 45 miles an hour, and that he turned into Belmont and followed it; that the light at the intersection was red, but plaintiff's car travelled through it and did not slow down; that the witness did not stop but crossed Narragansett and kept on going east; that the Ford was half way across Belmont when the Studebaker car entered the intersection.



It was submitted to the jury that he had testified somewhat differently at the inquest on Maskell; that there he had said that when he turned into Belmont plaintiff's car was practically up to Narragansett and that he was about 40 to 50 feet behind that car and he crossed Narragansett, stopping on the east side of the street. This would indicate that the green light was then on for those going east on Belmont.

It was in evidence that the deceased, Maskell, with his companion Dooling, together with several others, had visited several taverns previous to the accident and that a police officer had found a half filled bottle of whiskey under the front seat of the Ford car after the accident.

There was much testimony as to the position of the automobiles after the accident, and from photographs in the record it was apparent that the collision was violent, as both cars seemed to be damaged beyond repair. There were various items of evidence in conflict, but considering that the jury saw and heard the numerous witnesses and noted their conduct while testifying, we cannot say that the verdict for plaintiff is manifestly against the weight of the evidence.

Defendant asserts that reversible error was committed in the admission of the testimony of the physician, Dr. Paul K. Kent, who attended plaintiff when the accident happened on May 21, 1939. The doctor testified that the following October plaintiff came to his office and told him "that his knee gave in; that he fell down on the street." The doctor then made an examination of the knee and took an X-ray and testified that it was slightly more swollen; that the knee showed other injuries, and plaintiff was ordered to stay in bed for three weeks. Defendant contends that this was highly prejudicial to the defendant and that its





motion to strike all the evidence relating to any injury in October should have been allowed.

The jury returned a verdict in this case of \$2,000. The evidence shows that when plaintiff was injured in the collision on May 21, 1939, he was carried to Dr. Kent's office; he was bleeding profusely at his head and was in shock; there was a gash in his head 2 inches long; he suffered a sprain in his neck and bruises in his forehead and also on his left side and over his chest, and a deep cut over his left knee; there was a 2 inch cut or tear about 1 inch wide, with ragged laceration of the capsule that surrounds the knee joint and retains the fluid; the cut was in the bone and some shreds of clothing were pushed into it; the knee swelled and the head did not heal readily and was dressed each day until it finally healed; plaintiff was in the hospital until June 3, but at that time his head was not completely healed and his knee was still swollen; he remained in bed at home about three weeks and the doctor came almost every other day to dress the wound; he received heat treatments and was obliged to use crutches; plaintiff was 27 years old at the time of the accident. The doctor testified that there was a loss of function of the knee and that it would always be devoid of a smooth, lubricated movement; that he cannot kneel on that knee unless someone forced him to do it, and can raise it to about two-thirds of what it could be raised normally, and that this condition is permanent.

It has been held in many cases that even if incompetent evidence has been admitted on the question of damages, a reversal will not be ordered if it does not appear that the incompetent evidence enlarged the amount of the verdict. Clifford v. Pioneer Fire-Proofing Co., 232 Ill. 150, 156; Schiller v. Madden, 190

motion to strike it was sustained and it is hereby  
 October should have been filed.

The jury returned a verdict for the plaintiff.

The witness under the cross-examination testified that  
 collision on May 11, 1939, and was caused by the  
 he was driving property of his friend and was in fact; that  
 was a fault in his head; he was driving a vehicle in  
 his head and hands in his forehead and also in his chest  
 and over his chest, and he was sitting over his left knee; there  
 was a fault out on rear about 1 inch, and it was placed in  
 action of the engine that caused the head to be in motion  
 the fluid; the cut was in the head and some blood was  
 were pushed into it; the knee was also in the head and  
 really and was pressed over the head and it was really  
 left was in the head until 1939, but it was still in  
 was not completely healed and the head was still swollen; he  
 remained in bed at home about three weeks and the doctor came  
 almost every other day to check the wound; he was living home  
 treatment and was obliged to use crutches; he was living a 15 years  
 off of the head of the accident; the doctor testified that there  
 was a loss of function of the head and that it would be  
 devoid of a shock, immediate movement; and he was under great  
 that knee which caused the head to be in motion and he was  
 about two-thirds of what it could be; and it was  
 this condition is permanent.

It has been shown that the head was in motion and  
 evidence has been admitted on the question of the head  
 will not be exposed if it comes to the head and it is  
 evidence under the amount of the head and it is  
 Fire-Insurance Co., 200 Ill. 12, 13, 14; Robinson v. 1939

Ill. App. 624. Defendant's cases, cited in opposition, are not in point. The amount of the verdict does not appear to have been increased by the doctor's testimony as to the conditions in October.

It is said that the giving at the request of plaintiff of an instruction which omitted the necessity of plaintiff's exercise of ordinary care for his own safety, and directed a verdict, was reversible error. However, ~~xxxxxxxxxxxxxxx~~  
~~xxxxxxxxxxxxxxx~~ at least three times in plaintiff's other instructions, and twice in instructions given at the request of defendant, the jury was told that in order to recover, plaintiff must be in the exercise of due care. It is well established that no one instruction need state all the law, and it is sufficient if the instructions, taken as a series, correctly advise the jury. Minnis v. Friend, 360 Ill. 328, 339; People v. Falley, 366 Ill. 545, 551; Jones v. Esenberg, 299 Ill. App. 551, 557.

Considering the serious injuries received by plaintiff and the permanent subnormal condition of his left knee, we cannot say that the verdict of \$2,000 was excessive.

For the reasons above indicated, the judgment is affirmed.

AFFIRMED.

Matchett, and O'Connor, J.J., concur.

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41713

JOHN L. DICK, doing business as  
DICK'S POULTRY CO.,

Appellee,

v.

CAMPBELL SOUP COMPANY (Central Division),  
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

312 I.A. 261

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from judgments entered on the verdict of the jury. Plaintiff sued for the purchase price of poultry sold and delivered for the sum of \$1,229.72. The defendant filed a counterclaim asserting that in numerous purchases made over a period of time, plaintiff with the intention to cheat and defraud defendant injected water into the poultry thereby increasing its weight and thereby defrauding defendant to an amount (by the amendment to the counterclaim filed on the trial) alleged to be \$36,506.14. The verdict was for plaintiff on its claim and also for plaintiff on the counterclaim, and the judgments were entered accordingly.

Defendant argues for reversal in the first place that the verdict on which the judgments were entered was manifestly against the weight of the evidence, and secondly, that there was reversible error in rulings of the trial court in the admission and exclusion of evidence. We have examined the record as to evidence admitted and excluded and do not find substantial error.

Carl Elliott, a witness for plaintiff, testified that he worked for plaintiff at Colfax, Iowa, and assisted in packing the chickens. The barrels in which the chickens were put were received from the Campbell Soup Company (defendant). Elliott said he took chickens home occasionally and that he never found water in an unusual amount in any of the birds. He was allowed to

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so answer over objection.

Another witness (a poultry buyer for plaintiff) testified without objection that he did not see any poultry watered. On cross-examination he was asked supposing water had been found by the federal inspector in almost all of the poultry received from Dick, how he would explain that fact. An objection by plaintiff was sustained. Again the witness testified without objection that he never saw anyone put water into the birds. He was then asked further whether he had ever heard of such a thing happening at the Dick plant, and over objection was permitted to answer "No". The objection to the question asked about the federal inspector was properly sustained because based on an assumption not sustained by the evidence.

The other evidence, while of little weight, was not without some probative force, and there was no reversible error in the ruling admitting it.

Defendant cites many authorities to the effect that this court will set aside a judgment based on a verdict which is manifestly against the weight of the evidence. There is no doubt this is the law, as plaintiff concedes. With this rule in mind we have examined the evidence.

Plaintiff was a supplier of poultry whose place of business was located at Colfax, Iowa. Defendant is a manufacturer of soup in Chicago. Defendant made purchases from plaintiff over a period of time beginning March 8, 1938, and ending March 5, 1939. Plaintiff was accustomed to purchase the poultry alive and kill and dress it at Colfax, Iowa. For a part of the period involved in the transactions he operated one building and subsequently two. The number of employees at his plant was variously

so answer over on object.

Another thing, I think, is that the witness

tried without objection to the fact that the witness

On cross-examination he was asked if he had been

by the fact that he was asked if he had been

from which, how he would explain it, that he had been

this was sustained. The witness then said that he had

that he never saw anyone else there, that he had

asked further questions, but he was told that he was

at the high point, and over a question was asked to him

"No". The objection to the question was sustained.

Inspector was asked if he had been asked to examine

not sustained by the witness.

The other evidence, the witness said, was not

without some other facts, but he was not asked to

in the ruling sustaining it.

Defendant also said that he was asked to this

court will not take any more questions which he was

testify against the witness, but he was not asked

this in the law, as a result of the ruling, the witness

we have examined to the witness.

The witness then said that he was asked to this

ness was asked to this, but he was not asked to

of camp in this, but he was not asked to this

a period of time between the two periods, but he

1933. This was a statement of the witness, but he

kill and was at the same time, but he was not asked

involved in the transaction, but he was not asked



estimated from 12 to 15 and from 8 to 24. The method of dressing the poultry (as described by plaintiff) was that he maintained scalding vats which contained water of a temperature of approximately 160 degrees to 180 degrees, depending upon the kind, age, size and quality of the birds. After scalding the feathers were removed and the poultry soaked about 24 hours. This process was called "chilling". There were a number of intermediate steps, such as putting the birds in running cold water, removing extra feed and treating and improving the general appearance of the poultry. After the completion of this process the poultry was taken out of the vats and put into barrels. There was no particular person in plaintiff's plant assigned to any particular job. Each person did such work as came to hand. The poultry when packed in barrels was marked with the name of the shipper, delivered to the defendant and received in Chicago by the defendant's receiving clerk.

The clerk and the foreman of defendant testified as to the manner in which the poultry was received and weighed and examined as to quality, etc. The evidence showed that after the poultry was received it was segregated and repacked in barrels. If the poultry was to be used fresh it was put into a "retort basket" with a card stamped with a lot number which was identical with the lot number appearing on the barrel. The poultry that was intended to be used fresh was taken from the receiving room into the storeroom and from there directly to the eviscerating room. In that department the poultry was singed, opened, inspected and the entrails removed. The card placed on the poultry by the receiving clerk was continued as to each basket and these identified the shipper so that all poultry, whether fresh or otherwise, came to the eviscerating table identified with the name of



the shipper. Inspection by the government inspectors was made at the eviscerating table. It is a conveyor type of table mounted on a platform. It is preceded by a singeing apparatus, then a stationary table and an endless chain on which are fastened metal pans. The head and feet of the poultry are removed, then the craw and windpipe. Next the poultry is sent down and put on a side belt, and the entrails removed, and the poultry carried along in the pans for inspection. Depending upon the amount of production, there are one or two Government Inspectors at the table, and all of the poultry is inspected by them.

Mr. Weckler was the supervising inspector for the government and had been at the Campbell Soup Company plant for about 11 years. He had large experience examining and inspecting, as he testified, 10 million pieces of poultry. He testified to an unusual condition in regard to plaintiff's poultry as it came across the eviscerating table in March, 1938. Two pictures are in evidence illustrating the situation. The testimony indicated that when poultry coming from Dick's was opened, there was found an unusual amount of liquid in the pan. The inspectors investigated to find out whether this was a diseased condition and what was the source of the unusual amount of liquid. The evidence shows that the normal liquid inside of a bird is a very small amount and is known as the peritoneal fluid. It is more or less of a lubricating fluid and has sort of a biscuit touch, while in the birds in question, when they were opened, the liquid ran out to such an extent that it filled the bottom of the inspection pans. The minute the birds were opened the liquid oozed out and this was not true of a normal bird.

The poultry from Dick's place also when examined showed



an incision in the intestines or rectum which varied from a sixteenth of an inch to half an inch, and this also was not a normal condition. The inspector gave his opinion that the incision was caused by some sharp instrument, and that the water in the poultry was injected in the bird from an outside source. When Mr. Weckler observed this situation he called the same to the attention of the foreman of the Campbell Soup Company, who, however, paid no attention to it. From tests made at various dates (the last one in July, 1939) Weckler estimated that 95% of the chickens had water in them in abnormal quantities. Water is not an adulteration in food of this kind.

Dr. Madison and Inspector William S. Buchanan also gave similar testimony, and Mr. Woodhull, who was the superintendent of the Campbell Soup Company in that department, testified that Mr. Kamingo, the foreman to whom the condition with respect to the poultry was reported in 1938, failed to make any report to him although this was (he said) in violation of Kamingo's instructions.

In March, 1939, Woodhull having learned the facts above recited, reported to the purchasing agent, Mitchell, and he wrote the plaintiff and also telephoned him about the matter, telling him that the chickens had been watered. Dick replied that he was not feeling very well but would come to Chicago in a week or ten days.

This was in substance the testimony in behalf of the soup company, which assumed the burden of proof, it being admitted upon the trial that poultry had been delivered to the amount claimed by the plaintiff and not paid for by the defendant.

The plaintiff produced Mr. Romano, Food Inspector for



the State of Iowa, whose duty it was to inspect plaintiff's plant at Colfax. He testified that he had heard complaints from competitors of Dick that he was paying higher prices for poultry and indicated these competitors were jealous on that account. He doubted if water could have been injected into the birds upon the theory explained by Weckler and others.

Three former employees of plaintiff - Smith, Elliott and Normandin - testified to their work at plaintiff's plant and that to their knowledge no poultry was tampered with. The plaintiff also testified and categorically denied in detail every charge and every inference that was made as to the watering of the poultry.

The evidence tends to show that during the time when plaintiff was shipping poultry to defendant he shipped approximately one-half million pounds and about 125,000 birds. No bird had ever been rejected; no sample had ever been returned and defendant never sent him a sample showing the existence of water to an abnormal extent had been found in any of the birds. Defendant offered evidence tending to show that if all the birds shipped had been watered in the manner described by Weckler and others, it would have increased the weight about 7%, and on this theory asked judgment on its counterclaim.

The issue of fact as to whether Dick had in fact injected water into the birds to the extent stated was a question of fact for the jury. Dick undoubtedly knew whether he did this or not, and he testified in detail denying every charge that had been made against him. There was also evidence such as that of the failure to make any complaint or reject any of the poultry by defendant, all tending to discredit defendant's theory on the facts. The judge who tried the case and saw the witnesses has





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approved the verdict of the jury. It is not claimed there was any error in the instructions. The trial seems to have been fair. A comparatively small amount of the total poultry shipped contained the evidence of the injection of water. We think under all the circumstances the verdict of the jury should be allowed to stand. We cannot say it was clearly and manifestly against the weight of the evidence. The judgments will therefore be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.



41804

GEORGE A. BOSOMBURG,  
Appellant,

v.

BIRK BROS. BREWING CO., a  
corporation,  
Appellee.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

312 I.A. 262<sup>1</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action to recover \$300 for services rendered by him as an attorney for defendant and \$5 for money expended. There was a jury trial and a verdict and judgment in plaintiff's favor for \$50. He appealed to this court where the judgment was reversed and the cause remanded, (299 Ill. App. 610, abst.) on the ground that plaintiff was entitled to the full amount for which he sued or nothing, and since he was dissatisfied we held the judgment could not stand. There was another jury trial and a verdict and judgment in defendant's favor and an appeal to this court where the judgment was reversed and the cause remanded on the ground that we thought the jury was misled by the introduction of a check in evidence and that the verdict was against the manifest weight of the evidence. (306 Ill. App. 580, abst.). A third jury trial was had and again a verdict and judgment in defendant's favor and plaintiff's appeal is now before us.

There was no dispute in any of the trials but that plaintiff rendered the legal services for which he sought to recover. Defendant's position was that he had employed plaintiff as attorney to recover possession of a piece of machinery located in a building in Rockford, Illinois, for which services plaintiff was to be paid \$500. That possession of the machinery was obtained and defendant had paid the \$500. On the other hand, plaintiff's



position is that he was to perform certain services which would result in establishing defendant's right to the possession of the machinery for which he was to be paid the \$500. That he performed such services and defendant's right to possession was judicially determined. That afterwards the landlord of the building in which the machinery was located refused to deliver up the machinery and it was necessary for plaintiff to render other legal services to obtain possession for which defendant agreed to pay him what such services were reasonably worth; that he rendered the services and that they were reasonably worth \$300. In each case the question was submitted to the jury to determine what was the true agreement between the parties and in each case the three juries found in favor of defendant's position and judgment was entered on the verdicts.

We do not discuss the evidence for the reason that we did so in our <sup>two</sup> former opinions and the evidence in each case was substantially the same. While we held in the second appeal that the verdict was against the manifest weight of the evidence yet we are of opinion that since a third jury rendered a verdict in defendant's favor and since the case was tried before three different judges and each judge entered judgment on the verdict, we are unable to say that the verdict and judgment is not warranted by the evidence.

In Trustees of Schools v. City of Chicago, 308 Ill. App. 391, we quote from what the Supreme Court of the United States said in Stoll v. Gottlieb, 305 U. S. 165, and which we think is appropriate here. The Supreme court in that case said: "It is just as important that there should be a place to end as that there should be a place to begin litigation."

We have considered the points made by plaintiff and are



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of opinion that the question involved was one of fact for the jury. The issue was simple and easily understood and the instruction complained of was not prejudicially erroneous.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

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41844

JOHN VALANT,  
Appellee,

v.

METROPOLITAN LIFE INSURANCE  
COMPANY, a corporation,  
Appellant.

PETITION FOR LEAVE TO APPEAL  
FROM THE ORDER OF MUNICIPAL  
COURT OF CHICAGO GRANTING  
A NEW TRIAL.

312 I.A. 262<sup>2</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

This suit was brought on a life insurance policy issued April 5, 1933, for \$2500. There was a jury trial and a verdict in favor of defendant. Afterward the court entered judgment notwithstanding the verdict in favor of plaintiff for \$2875, the face of the policy with interest, from which judgment defendant appealed to this court. The defense interposed was that someone impersonated the insured, Kazimer Valant, and the jury by their verdict found this to be the fact but the verdict was set aside and judgment entered in favor of plaintiff on the ground that the policy was incontestable after two years. We reversed the judgment and remanded the cause for a new trial holding that "where a policy of insurance has been procured by impersonation of the person named in the policy as the insured, without application made or authorized by the designated insured, no contract is made, and the incontestable clause does not estop the insurance company from denying liability." Valant v. Metropolitan Insurance Co., 302 Ill. App. 196. There was another trial and again a verdict was returned in favor of defendant. But plaintiff's motion for a new trial was allowed, from which order defendant by leave of this court, prosecutes this appeal.

The court in stating its reason for awarding a new trial said: "Well, this case the Court has given a great deal of consideration to. The fact that two juries have passed on it

JOHN VALENTI,  
Appellee,

v.

METROPOLITAN LIFE INSURANCE  
COMPANY, a corporation,  
Appellant.

MR. JUSTICE SUTHERLAND.

This suit

was tried at the Circuit Court of the District of Columbia, and

judgment was rendered in favor of the appellant, Metropolitan Life Insurance Company.

The facts of the case are as follows: The appellant, Metropolitan Life Insurance Company,

issued a policy of life insurance to the appellee, John Valenti, on April 8, 1935,

the face of the policy being \$10,000. The policy provided that in the event of the death of the

appellee, the proceeds of the policy should be paid to the estate of the appellee, or to such other

person as the appellee might designate in writing. The appellee designated the appellant as the beneficiary of the

policy, and the appellant accepted the designation. The appellant then paid the proceeds of the policy to the

appellee's estate, and the appellee's estate accepted the payment. The appellee's estate then

reversed the judgment and set aside the payment of the proceeds of the policy to the appellee's estate.

holding that where a policy of life insurance is issued to a person, and the proceeds of the policy are

improperly paid to the estate of the insured, the estate is entitled to recover the proceeds of the policy.

without a election made by the insured. The appellant appeals from the judgment of the Circuit Court of the District of Columbia,

which affirmed the judgment of the District Court. The appellant contends that the judgment of the District Court is

correct, and that the judgment of the Circuit Court is erroneous. The appellee contends that the judgment of the Circuit Court is

correct, and that the judgment of the District Court is erroneous. The appellee's estate contends that the judgment of the District Court is

correct, and that the judgment of the Circuit Court is erroneous. The appellee's estate contends that the judgment of the District Court is

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correct, and that the judgment of the Circuit Court is erroneous. The appellee's estate contends that the judgment of the District Court is

correct, and that the judgment of the Circuit Court is erroneous. The appellee's estate contends that the judgment of the District Court is

has greatly impressed the Court, too, but after hearing all the evidence in this case the Court can't say that any fraud has been perpetrated on the insurance company. The motion for a new trial is allowed.

"I am sorry Mr. Melaniphy. You tried the case admirably but the Court in his own heart and in his own mind, in his own conscience, is convinced that no fraud was perpetrated on the Metropolitan Life Insurance Company. For that reason the Court is setting the verdict of the jury aside and a new trial is granted." This is the proper procedure. Gavin v. Keter, 278 Ill. App. 308.

From the foregoing it is clear that the trial judge in considering the matter was of opinion the verdict was not sustained by a preponderance of the evidence. He saw and heard the witnesses testify and was in a better position to determine what the facts in the case were than we are in a court of review where we have only the printed page before us. Under the law we are not authorized to disturb an order of the trial court awarding a new trial after verdict unless there was a clear abuse of discretion. Hoffner v. Reinberg, 296 Ill. App. 13; Tone v. Halsey, Stuart & Co., Inc. 286 Ill. App. 169; Carter v. Geeseman, 303 Ill. App. 280.

Upon a careful consideration of all the evidence in the record we are unable to say that the record discloses a clear abuse of discretion.

In our opinion on the former appeal to this court, we discussed the facts as shown by the evidence, which is substantially the same as in the record before us, although there were some other witnesses and other additional evidence was introduced. On each trial the defense interposed was that the person who signed the application and submitted to the medical examination was not



Kazimer Valant to whom the policy was issued but that someone had impersonated him. Since we are of opinion there must be a retrial of the case we do not discuss the evidence except to say we are of opinion that the court did not err in admitting in evidence defendant's Exhibit 2, which was in the form of a statement signed by the witness, Stone, which tended to impeach testimony he gave on the trial. When he was called as an adverse witness under §60, of the Civil Practice Act, the opposing counsel then had the right to examine him as to all matters relative to which he had been interrogated. Kubin v. Chicago Title & Trust Co., 307 Ill. App. 12.

We are further of opinion it was not reversibly erroneous to permit the exhibits to be taken by the jury when they retired to consider the case.

Counsel for defendant say there were no errors in the instructions prejudicial to plaintiff; that the only instruction which the court gave that plaintiff objected to was Instruction No. 1, by which the jury were told that the burden of proof was upon plaintiff to prove his case by a preponderance of the evidence. The record does not disclose at whose instance the instructions were given nor whether they were written or oral which ought not to occur again upon a retrial of the case. If the case were tried upon the only controverted question, as to whether the insured had been impersonated, the issues involved and the instructions should be such as to in no way tend to confuse the jury. The case is simple, the rules of law applicable are well-known and nothing further need be said in this opinion.

The order of the Municipal court of Chicago awarding a new trial is affirmed.

ORDER AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

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41347

EPHIAN GANT, WILLIAM GANT and  
DAVID GANT,

Appellants,

v.

WILLIAM McDOWELL, Executor of  
the Last Will and Testament of  
NINA JOHNSON, deceased, and  
PROVIDENT HOSPITAL AND TRAINING  
SCHOOL, a Corporation, DR. ROSCOE  
GILES, MOUNT VERNON BAPTIST CHURCH,  
U. HAIRLEY, ORA BELL DEAN and  
LIZZIE STRONG, Legatees therein,  
Appellees.

18A  
APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

312 I.A. 378

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Nina Johnson died on June 29, 1936. On December 15, 1936, an instrument purporting to be her last will and testament was admitted to probate in the Probate Court of Cook County. Thereafter plaintiffs filed their complaint to have the said instrument set aside and held for naught upon the ground that it was not the last will and testament of Nina Johnson, that it was not signed by her, and that the instrument was a forgery. Attached to the complaint was a copy of the instrument that had been admitted to probate. Answers were filed by the various defendants, in which they denied that the instrument in question was a forged instrument and asserted that it was the last will and testament of Nina Johnson. The theory of fact of plaintiffs was that the instrument in question was made by certain of the defendants after the death of Nina Johnson.

There have been two trials of this cause: the first, before Judge Prystalski and a jury. The jury returned a verdict finding the issues for the contestants "and that the instrument in writing purporting to be the last will and testament of Nina Johnson, deceased, is not the last will and testament of Nina Johnson, deceased." Defendants filed a written motion for a





new trial in which they set up that the verdict was against the manifest weight of the evidence and that "the defendants have discovered new and competent evidence contradictory of evidence offered by plaintiffs and that would affect the finding of the Jury, which evidence has come to the knowledge of the defendants since the trial of this cause." Attached to the motion were a number of affidavits. Judge Prystalski granted the motion for a new trial. The second trial was before Judge Rush and a jury. At the conclusion of plaintiffs' evidence the defendants asked the court to give to the jury the following instruction: "The Court instructs the Jury to find that the instrument purporting to be the Will of Nina Johnson is her Last Will and Testament." This motion was denied. At the conclusion of all the evidence defendants renewed the said motion and the trial court reserved decision upon the motion. The jury returned a verdict finding the issues for the contestants "and that the instrument in writing purporting to be the last will and testament of Nina Johnson deceased is not the last will and testament of Nina Johnson deceased." Defendants then filed a "motion for judgment notwithstanding the verdict," in which they set up the following grounds in support of the motion: "1. The verdict is against the manifest weight of the evidence. 2. The verdict is not legally supported by the evidence. 3. Justice has not been done. 4. The verdict was the result of bias and prejudice on the part of the Jury against the defendants and of sympathy and partiality on the part of the Jury in favor of the plaintiffs." At the same time the defendants filed a motion for a new trial. In spite of the nature of the grounds set up in support of the motion for judgment notwithstanding the verdict the court sustained that motion and entered a decretal judgment "that the writing dated March 8, 1935, and admitted to probate in the Probate Court of Cook County, Illinois, on December 16, 1936, as the last will and testa-



ment of Nina Johnson, deceased, is the last will and testament of Nina Johnson, deceased." At the same time the court entered an order that overruled defendants' motion for a new trial. Plaintiffs have appealed from the decretal judgment.

Plaintiffs strenuously contend that they made out a clear prima facie case and that the trial court erred in entering judgment for the defendants notwithstanding the verdict of the jury in favor of plaintiffs. This contention is clearly a meritorious one. Indeed, counsel for defendants, upon the oral argument in this court, was unable to justify the action of the trial court. As the case will probably be tried again we refrain from citing facts and circumstances in the case that amply support plaintiffs' contention. It will be noted that both Judge Prystalski and Judge Rush refused to direct a verdict for defendants at the close of plaintiffs' evidence, and it is a reasonable inference from the record that Judge Prystalski granted defendants' motion for a new trial because of the nature of the affidavits presented in support of the motion. It is not permissible for a trial judge, on a motion for judgment non obstante veredicto, to weigh the evidence and enter a judgment according to his opinion as to where lies the greater weight of the evidence. To permit such a practice would do away with the right to a trial by jury and substitute therefor the judgment of the court. It is only where there is no evidence to sustain either a plaintiff's or a defendant's claim that a judgment may be rendered notwithstanding the verdict of a jury. In the instant case, as plaintiffs made out a clear prima facie case, the trial court had no right to substitute his judgment as to the weight of the evidence in place of the judgment of the jury. If the court was of the opinion that the verdict of the jury was not sustained by a preponderance of the evidence, it was his duty, under the law, to set aside the verdict and order

ment of Miss Johnson, a witness, is that it will be necessary of  
Miss Johnson, deceased. "At the same time the court should be  
order that overruled instructions, as given to the jury, be  
this have resulted from the original findings.  
Miss Johnson's counsel, however, made out a clear  
-prima facie case and that the trial court erred in entering judg-  
ment for the defendant notwithstanding the verdict of the jury in  
favor of plaintiff. This contention is clearly and convincingly  
Indeedy, counsel for defendant, even though he was in this court,  
was unable to justify the action of the trial court. In the case  
will probably be tried again as certain facts and circum-  
stances in the case that clearly support the plaintiff's contention. It  
will be noted that both Judge Fitzgerald and Judge Ryan refused to  
direct a verdict for defendant as the close of plaintiff's evidence,  
and it is a reasonable inference from the record that Judge Fitzgerald  
granted defendant's motion for a new trial because of the failure of  
the affidavits presented in support of the motion. It is not per-  
missible for a trial judge, on a motion for judgment non obstante  
verdicto, to weigh the evidence and enter judgment according to  
his opinion as to where lies the greater weight of the evidence. To  
permit such a practice would do away with the right to a trial by  
jury and substitute therefor the judgment of the court. It is only  
where there is no evidence to sustain plaintiff's claim or a  
defendant's claim that a judgment may be rendered notwithstanding  
the verdict of a jury. In the instant case, as plaintiff made out  
a clear prima facie case, the trial court had no right to annul its  
judgment as to the weight of the evidence in place of the judg-  
ment of the jury. If the court was of the opinion that the verdict  
of the jury was not sustained by a preponderance of the evidence,  
it was his duty, under the law, to set aside the verdict and order

a new trial. It is entirely unnecessary to cite the many cases that support the familiar and settled principles of law that we have stated.

The decretal judgment of the Circuit court of Cook county entered December 18, 1939, "that judgment is hereby entered in favor of the defendants and the verdict of the Jury rendered herein on December 6, 1939 is hereby set aside and to be held for naught. It is further ordered, adjudged and decreed that the writing dated March 8, 1935 and admitted to probate in the Probate Court of Cook County, Illinois, on December 16, 1936, as the last will and testament of Nina Johnson, deceased, is the last will and testament of Nina Johnson, deceased," is reversed, and the cause remanded. The order entered upon the same date overruling the motion of the defendants for a new trial is inconsistent with the decretal judgment, and we assume it was inadvertently entered. After the court sustained the motion for judgment notwithstanding the verdict, he should not have passed upon the motion for a new trial. The trial court will vacate the order overruling the motion for a new trial and then pass upon said motion.

DECRETAL JUDGMENT ENTERED DECEMBER 18,  
1939, REVERSED, AND CAUSE REMANDED  
WITH DIRECTIONS.

Sullivan and Friend, JJ., concur.

a new trial. It is generally understood that such cases  
that support the verdict are settled on a trial  
we have stated.

The defendant, John J. Sullivan, entered December 18, 1938, at the County Jail in  
of the defendant and the ver for the County Jail in  
December 6, 1938, at the County Jail in  
in further charges, charged and received the County Jail  
March 6, 1939, at the County Jail in  
County, Illinois, on December 18, 1938, at the County Jail  
sent of John Johnson, deceased, in the County Jail in  
John Johnson, deceased, at the County Jail in  
The order entered upon the State's motion of the  
defendants for a new trial is inconsistent with the defendant  
judgment, and so should be set aside and a new trial  
court sustained the motion for judgment notwithstanding the ver-  
dict, in which case the motion for a new trial.  
The trial court will vacate the order overruling the motion for a  
new trial and then set aside the motion.

FILED IN THE COUNTY CLERK'S OFFICE  
JANUARY 18, 1939  
JANUARY 18, 1939  
JANUARY 18, 1939

Sullivan and Friend, Jr., counsel.

41347

312 Sup. App. 57  
Adm. Pt. 3  
2-1-42

EPHIAN GANT, WILLIAM GANT and  
DAVID GANT,

Appellants,

v.

WILLIAM McDOWELL, Executor of  
the Last Will and Testament of  
NINA JOHNSON, deceased, and  
PROVIDENT HOSPITAL AND TRAINING  
SCHOOL, a Corporation, DR. ROSCOE  
GILES, MOUNT VERNON BAPTIST CHURCH,  
U. HAIRLEY, ORA BELL DEAN and  
LIZZIE STRONG, Legatees therein,  
Appellees.

APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

312 I.A. 378<sup>2</sup>

OPINION ON PETITION FOR REHEARING.

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On November 28, 1941, we filed the following opinion in  
this cause:

"Nina Johnson died on June 29, 1936. On December 16,  
1936, an instrument purporting to be her last will and testament  
was admitted to probate in the Probate court of Cook County.  
Thereafter plaintiffs filed their complaint to have the said  
instrument set aside and held for naught upon the ground that  
it was not the last will and testament of Nina Johnson, that  
it was not signed by her, and that the instrument was a forgery.  
Attached to the complaint was a copy of the instrument that had  
been admitted to probate. Answers were filed by the various  
defendants, in which they denied that the instrument in question  
was a forged instrument and asserted that it was the last will  
and testament of Nina Johnson. The theory of fact of plaintiffs  
was that the instrument in question was made by certain of the  
defendants after the death of Nina Johnson.

"There have been two trials of this cause: the first,  
before Judge Prystalski and a jury. The jury returned a verdict  
finding the issues for the contestants and that the instrument

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*V. J. B. ...*

1. The first of these is the *Journal of the American Medical Association*, which is the largest and most influential of the medical journals in the United States. It is published weekly and is read by a large number of physicians. The second is the *New England Journal of Medicine*, which is also published weekly and is read by a large number of physicians. The third is the *Lancet*, which is published weekly and is read by a large number of physicians. The fourth is the *British Medical Journal*, which is published weekly and is read by a large number of physicians. The fifth is the *Medical Record*, which is published weekly and is read by a large number of physicians. The sixth is the *Medical News*, which is published weekly and is read by a large number of physicians. The seventh is the *Medical Record and Review*, which is published weekly and is read by a large number of physicians. The eighth is the *Medical Record and Review*, which is published weekly and is read by a large number of physicians. The ninth is the *Medical Record and Review*, which is published weekly and is read by a large number of physicians. The tenth is the *Medical Record and Review*, which is published weekly and is read by a large number of physicians.

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THE UNIVERSITY OF CHICAGO LIBRARY

RECEIVED THE DIRECTOR, OFFICE OF THE SECRETARY OF DEFENSE

1. The first part of the paper is devoted to the study of the asymptotic behavior of the solutions of the system (1) as  $t \rightarrow \infty$ . It is shown that the solutions of the system (1) are bounded and tend to zero as  $t \rightarrow \infty$  if the matrix  $A$  is stable. The second part of the paper is devoted to the study of the asymptotic behavior of the solutions of the system (1) as  $t \rightarrow \infty$  if the matrix  $A$  is not stable. It is shown that the solutions of the system (1) are unbounded and tend to infinity as  $t \rightarrow \infty$  if the matrix  $A$  is not stable.



in writing purporting to be the last will and testament of Nina Johnson, deceased, is not the last will and testament of Nina Johnson, deceased.' Defendants filed a written motion for a new trial in which they set up that the verdict was against the manifest weight of the evidence and that 'the defendants have discovered new and competent evidence contradictory of evidence offered by plaintiffs and that would affect the finding of the Jury, which evidence has come to the knowledge of the defendants since the trial of this cause.' Attached to the motion were a number of affidavits. Judge Prystalski granted the motion for a new trial. The second trial was before Judge Rush and a jury. At the conclusion of plaintiffs' evidence the defendants asked the court to give to the jury the following instruction: 'The Court instructs the Jury to find that the instrument purporting to be the Will of Nina Johnson is her Last Will and Testament.' This motion was denied. At the conclusion of all the evidence defendants renewed the said motion and the trial court reserved decision upon the motion. The jury returned a verdict finding the issues for the contestants 'and that the instrument in writing purporting to be the last will and testament of Nina Johnson deceased is not the last will and testament of Nina Johnson deceased.' Defendants then filed a 'motion for judgment notwithstanding the verdict,' in which they set up the following grounds in support of the motion: '1. The verdict is against the manifest weight of the evidence. 2. The verdict is not legally supported by the evidence. 3. Justice has not been done. 4. The verdict was the result of bias and prejudice on the part of the Jury against the defendants and of sympathy and partiality on the part of the Jury in favor of the plaintiffs.' At the same time the defendants filed a motion for a new trial. In spite of the nature of the grounds set up in support of the

— 4 —

motion for judgment notwithstanding the verdict the court sustained that motion and entered a decretal judgment 'that the writing dated March 8, 1935, and admitted to probate in the Probate court of Cook County, Illinois, on December 16, 1936, as the last will and testament of Nina Johnson, deceased, is the last will and testament of ~~Nina~~ Johnson, deceased.' At the same time the court entered an order that overruled defendants' motion for a new trial. Plaintiffs have appealed from the decretal judgment.

"Plaintiffs strenuously contend that they made out a clear prima facie case and that the trial court erred in entering judgment for the defendants notwithstanding the verdict of the jury in favor of plaintiffs. This contention is clearly a meritorious one. Indeed, counsel for defendants, upon the oral argument in this court, was unable to justify the action of the trial court. As the case will probably be tried again we refrain from citing facts and circumstances in the case that amply support plaintiffs' contention. It will be noted that both <sup>Judge</sup> Prystalski and Judge Rush refused to direct a verdict for defendants at the close of plaintiffs' evidence, and it is a reasonable inference from the record that Judge Prystalski granted defendants' motion for a new trial because of the nature of the affidavits presented in support of the motion. It is not permissible for a trial judge, on a motion for judgment non obstante veredicto, to weigh the evidence and enter a judgment according to his opinion as to where lies the greater weight of the evidence. To permit such a practice would do away with the right to a trial by jury and substitute therefor the judgment of the court. It is only where there is no evidence to sustain either a plaintiff's or a defendant's claim that a judgment may be rendered notwithstanding the verdict of a jury. In the instant case, as plaintiffs made out a clear prima facie

the above is a summary of the information received from the various sources mentioned above. It is to be understood that the information is not complete and that further investigation is being conducted. The information is being furnished to you for your information and for your use in the conduct of your duties. It is to be understood that the information is not to be used for any other purpose without the express written consent of the Bureau of Investigation.

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In the instant case, the plaintiff made out a prima facie case. Judgment may be rendered notwithstanding the verdict of a jury, to sustain either a plaintiff or a defendant's claim and a

case, the trial court had no right to substitute his judgment as to the weight of the evidence in place of the judgment of the jury. If the court was of the opinion that the verdict of the jury was not sustained by a preponderance of the evidence, it was his duty, under the law, to set aside the verdict and order a new trial. It is entirely unnecessary to cite the many cases that support the familiar and settled principles of law that we have stated.

"The decretal judgment of the Circuit court of Cook county entered December 18, 1939, 'that judgment is hereby entered in favor of the defendants and the verdict of the Jury rendered herein on December 6, 1939 is hereby set aside and to be held for naught. It is further ordered, adjudged and decreed that the writing dated March 8, 1935 and admitted to probate in the Probate Court of Cook County, Illinois, on December 16, 1936, as the last will and testament of Nina Johnson, deceased, is the last will and testament of Nina Johnson, deceased,' is reversed, and the cause remanded. The order entered upon the same date overruling the motion of the defendants for a new trial is inconsistent with the decretal judgment, and we assume it was inadvertently entered. After the court sustained the motion for judgment notwithstanding the verdict, he should not have passed upon the motion for a new trial. The trial court will vacate the order overruling the motion for a new trial and then pass upon said motion."

Defendants did not file a petition for rehearing. Plaintiffs filed a petition for rehearing in which they contend that we erred in assuming that the trial court inadvertently entered the order overruling defendants' motion for a new trial; that we further erred in directing the trial court to vacate said order and then pass upon the motion for a new trial; and that we

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...order ...  
...defendants ...  
...judgment, ...  
...the court ...  
...the verdict, ...  
...new trial, ...  
...the motion ...

...Defendants ...  
...Plaintiffs ...  
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...entered ...  
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...order ...

further erred in our remanding order in not directing the trial court to enter a decretal judgment in favor of plaintiffs in accordance with the verdict returned by the jury. On December 10, 1941, we allowed the petition for rehearing and we allowed defendants ten days' time to answer the petition for rehearing. They have failed to file an answer.

Plaintiffs call our attention to the fact that the record shows that the order overruling defendants' motion for a new trial was entered by the trial court upon the motion of the attorneys for defendants. Plaintiffs also call attention to the fact that defendants failed to file any cross-error in this court; that in their brief in this court they did not question the action of the court in denying their motion for a new trial. Plaintiffs cite numerous decisions in support of their contention that under the record we were not justified in ordering the trial court to vacate the order denying defendants' motion for a new trial and to then pass upon said motion; that after reversing the decretal judgment of the trial court entered December 18, 1939, we should have remanded the cause with directions to the trial court to enter a decretal judgment in favor of plaintiffs in accordance with the verdict of the jury. The contentions of plaintiffs are clearly meritorious. Indeed, as we have heretofore stated, defendants have not seen fit to file an answer to plaintiffs' petition for a rehearing. Our former opinion, save as to the last paragraph thereof, is readopted. The following decretal judgment is substituted for the decretal judgment in our original opinion:

The decretal judgment of the Circuit court of Cook county entered December 18, 1939, "that judgment is hereby entered in favor of the defendants and the verdict of the Jury rendered herein on December 6, 1939 is hereby set aside and to be held for naught. It is further ordered, adjudged and decreed that





the writing dated March 8, 1935 and admitted to probate in the Probate Court of Cook County, Illinois, on December 16, 1936, as the last will and testament of Nina Johnson, deceased, is the last will and testament of Nina Johnson, deceased," is reversed, and the cause is remanded with directions to the trial court to enter a decretal judgment in favor of plaintiffs in accordance with the verdict rendered by the jury.

DECRETAL JUDGMENT ENTERED DECEMBER  
18, 1939, REVERSED, AND CAUSE  
REMANDED WITH DIRECTIONS.

Sullivan and Friend, JJ., concur.

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41363

BEN'S TRI-STATE MOTOR, INC.,  
a corporation,

Appellee,

APPEAL FROM MUNICIPAL

v.  
JOHN F. CUNEO COMPANY, a  
corporation,

Appellant.

COURT OF CHICAGO.

312 I.A. 379

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment entered against it in the sum of \$509.50. The case was tried by the court without a jury.

Plaintiff's statement of claim is as follows:

"1. Plaintiff's claim is in the sum of \$525.50 for moneys due and owing from the defendant to the plaintiff for services rendered with reference to transportation of merchandise from time to time for and in behalf of the defendant at its special instance and request, an itemized statement of such services is as follows:

[For the sake of convenience we have numbered the items.]

|      |         |        |          |
|------|---------|--------|----------|
| [1]  | 3-18-37 | F-5895 | \$ 19.20 |
| [2]  | 3-19- " | E-8715 | 16.00    |
| [3]  | 3-20- " | E-8721 | 2.83     |
| [4]  | 3-24- " | F-4705 | 21.56    |
| [5]  | 3-25- " | E-8677 | 16.00    |
| [6]  | 3-26- " | E-8682 | 14.83    |
| [7]  | 3-27- " | E-8694 | 16.00    |
| [8]  | 3-29- " | E-8750 | 5.96     |
| [9]  | 3-30- " | E-8761 | .69      |
| [10] | 3-31- " | E-8777 | 8.92     |
| [11] | 3-31- " | F-4613 | 18.48    |
| [12] | 4-1- "  | E-8782 | 12.89    |
| [13] | 4-1- "  | F-4628 | 21.56    |
| [14] | 4-2- "  | E-8750 | 1.92     |
| [15] | 4-2- "  | E-4649 | 16.00    |
| [16] | 4-2- "  | E-8799 | 3.55     |
| [17] | 4-3- "  | E-5779 | 1.96     |
| [18] | 4-3- "  | E-8514 | 5.61     |
| [19] | 4-5- "  | E-8520 | 5.00     |
| [20] | 4-6- "  | F-4575 | 16.48    |
| [21] | 4-6- "  | E-8529 | 20.42    |
| [22] | 4-7- "  | E-8535 | .09      |
| [23] | 4-7- "  | F-4952 | 23.48    |
| [24] | 4-8- "  | F-4958 | 16.48    |
| [25] | 4-8- "  | E-8554 | 5.99     |
| [26] | 4-9- "  | E-8563 | 1.58     |
| [27] | 4-14- " | E-8595 | 21.66    |
| [28] | 4-14- " | E-8725 | 25.19    |
| [29] | 4-16- " | E-8807 | 17.36    |
| [30] | 4-16- " | E-8808 | .35      |
| [31] | 4-20- " | E-8829 | 9.26     |
| [32] | 4-20- " | E-8828 | 16.00    |



|      |         |        |                 |
|------|---------|--------|-----------------|
| [33] | 4-20- " | E-8828 | 16.00           |
| [34] | 4-21- " | E-8836 | 16.00           |
| [35] | 4-21- " | E-8835 | 16.00           |
| [36] | 4-22- " | E-8842 | 16.00           |
| [37] | 4-22- " | E-8845 | 3.85            |
| [38] | 4-22- " | E-5642 | 8.99            |
| [39] | 4-23- " | E-8853 | 14.16           |
| [40] | 4-24- " | E-8858 | 16.00           |
| [41] | 4-24- " | E-2881 | 16.00           |
| [42] | 5-13- " | F-5925 | 19.20           |
|      |         |        | <u>\$525.50</u> |

"2. Plaintiff further alleges that it has made repeated demands upon the said defendant for the payment of the aforementioned moneys but that the said defendant has failed and refused to do same.

"Wherefore this suit is brought."

In defendant's affidavit of merits it alleged, inter alia, payment in full for the identical services sued upon in the statement of claim.

The trial court held that under the pleadings the only issue was payment and that the burden of proof as to payment was upon defendant. Defendant offered evidence in support of its claim that it had paid in full for the services sued upon. Plaintiff offered no evidence. It was conceded that item number 33 was a duplication of item number 32, and the amount of this item, \$16, was not allowed by the trial court.

Defendant strenuously contends that the uncontradicted evidence shows that it paid in full for the identical services sued upon in the statement of claim. We have carefully examined the evidence bearing upon this contention and we are satisfied that the evidence shows payment in full of items 8 to 32, both inclusive, and 34 to 41, both inclusive. The proof does not show payment of items 1 to 7, both inclusive, and item 42. The amounts of these eight items aggregate \$125.62.

The judgment of the Municipal court of Chicago is reversed and judgment is entered here in favor of plaintiff and against defendant in the sum of \$125.62.

JUDGMENT REVERSED AND JUDGMENT HERE IN  
FAVOR OF PLAINTIFF IN THE SUM OF \$125.62.  
Sullivan and Friend, JJ., concur.



41383

DOREEN WILCOX,  
Appellant,

v.

FRED S. TRACY,  
Appellee.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

312 I.A. 379<sup>2</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action for damages for personal injuries sustained by plaintiff in an automobile accident. The case was tried by the court without a jury and there was a finding in favor of defendant. Plaintiff appeals from a judgment entered upon the finding.

The accident occurred on the afternoon of June 4, 1937. Plaintiff was driving an automobile southward on Oak Park avenue between Augusta boulevard and Iowa street. Defendant was driving his automobile southward on Oak Park avenue and at the point of the accident drove his automobile into the rear end of plaintiff's automobile with such force that the left rear end of plaintiff's car was caved in and the car was driven partially over the west curb of Oak Park avenue and to a point fifty feet south of the point of impact. It was a clear day and the pavement was dry. Plaintiff was seriously injured.

The theory of plaintiff was that she was an experienced automobile driver; that as she drove south on Oak Park avenue she was between six and ten feet from the west curb; that just before the impact she was driving her automobile alongside the west curb of Oak Park avenue about midway between Augusta boulevard and Iowa street and that at the instant of the impact she was in the act of parking it, or had just completed parking it; that when she turned from the roadway to park the car she drove it southwesterly for about fifty feet before she reached the curb and that she then continued along the curb and parallel to it for

DORRIS ELLIOTT  
JAMES S. ELLIOTT  
JAMES S. ELLIOTT  
JAMES S. ELLIOTT

An action for damages for personal injuries sustained by  
plaintiff in an automobile accident. The case was tried by the  
court without a jury and judgment was entered in favor of  
plaintiff. Plaintiff appeals from the judgment on the ground  
that the accident occurred on the afternoon of June 4, 1934.  
Plaintiff was driving an automobile southward on Oak Park Avenue  
between Augusta Boulevard and 10th Street. Defendant was driving  
his automobile southward on Oak Park Avenue at the point of  
the accident drove his automobile into the rear end of plaintiff's  
automobile which then forced it to the left side of the road. The  
car was dented in and the car was driven southward over the west  
curb of Oak Park Avenue and to the point of impact south of the  
point of impact. It was a light colored sedan. Plaintiff was seriously injured.  
The theory of plaintiff is that defendant was driving  
automobile driven; that as she drove south of Oak Park Avenue  
she was between the curb and the west curb; the last  
before the impact she was driving the automobile southward the  
west curb of Oak Park Avenue about thirty feet from the Augusta Boulevard  
and that at the point of the impact she  
was in the act of parking it, or had just completed parking it;  
that when she turned from the roadway to park the car she drove  
it southwardly for about fifty feet before she reached the curb  
and that she then continued along the curb and parallel to it for



some distance before the impact; that her car was equipped with a rear stop light which went on automatically when the brake was applied and that in bringing her car to a stop she applied the brake; that just as she started to drive southwest in order to reach the curb to park she had sounded her horn to attract the attention of her maid, who at that moment was walking on the east sidewalk about fifty feet in front of plaintiff's automobile; that as she sounded the horn she "slowed the speed of the car down gradually."

Defendant's theory of fact was that he was proceeding southward about ten feet from the west curb and at a speed of twenty-five miles an hour; that plaintiff's car, without warning, came to a sudden stop in the middle of the southbound lane of travel directly in his line of travel; that the impact occurred in the middle of the block, where cars do not normally stop; that defendant had not reasonable time in which to avoid the collision and that the accident was caused solely by the negligence of plaintiff; that plaintiff brought her car to a stop eight or nine feet from the curb.

Plaintiff contends that the finding of the trial court was against the manifest weight of the evidence. Plaintiff's theory of fact was supported by her own testimony and the testimony of her son, who was in her car, and by Miss Sheetz, the maid, who was on the sidewalk at the time of the accident. Defendant was the sole witness in his behalf as to the manner of the accident. After a careful examination of the entire evidence that bears upon the accident we have reached the conclusion that the instant contention of plaintiff is a meritorious one. As the case will probably be tried again we refrain from citing and commenting upon the testimony of the witnesses. Upon the trial defendant sought to impeach the testimony of Miss Sheetz by means of a shorthand reporter who



claimed to have taken a statement made by Miss Sheetz to one of the attorneys of defendant on the night of June 20, 1939. Upon the oral argument in this court it was stated that this attorney is no longer connected with the defense of the cause and it was stipulated by the counsel who represent defendant here that the alleged impeaching evidence should be disregarded by this court in its consideration of the appeal. Therefore we will not state the evidence that bears upon the alleged impeachment. However, upon a second trial of the cause the trial court should not permit the alleged impeaching evidence to be given. From the attitude of defendant's counsel upon the oral argument we entertain no doubt that the said evidence will not be offered. It should not be.

The judgment of the Circuit court of Cook county is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE  
REMANDED FOR A NEW TRIAL.

Sullivan and Friend, JJ., concur.

It is claimed to have taken place on the night of the 1st of June, 1934, at the residence of the defendant, 1234 1st Street, New York City. The defendant, who is now in custody, is alleged to have been present at the time of the shooting. The prosecution claims that the defendant was the one who fired the shot which killed the victim. The defense claims that the defendant was not present at the time of the shooting and that the shooting was committed by another person. The case is now before the jury for their consideration.

Very truly yours,  
 J. Edgar Hoover  
 Director

Sullivan and Walsh, Attorneys

41398

IRMA WATKINS,  
Appellee,

v.

TOWN OF CICERO, a Municipal  
Corporation,  
Appellant.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

312 L.A. 380

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action against defendant for injuries alleged to have been received by plaintiff from a fall on a sidewalk on March 4, 1938. A jury returned a verdict finding defendant guilty and assessing plaintiff's damages at \$5,500. Defendant appeals from a judgment entered upon the verdict.

On March 4, 1938, about 4:30 p. m., plaintiff, while walking in a southerly direction on the sidewalk on the east side of 61st Court, Cicero, Illinois, fell when she reached a point in front of a building known as 6129 West Roosevelt road. The evidence for plaintiff showed that at the place where she fell there was a defect in the sidewalk; that one slab in the sidewalk had settled so that it was lower than the slab adjoining it, thus making a difference in the level of the sidewalk at that place. Plaintiff testified that the difference in the level was about two or three inches. John Dietrich testified that one slab was about two and one-half inches lower than the other. Mrs. Engelsman testified that the difference in the level was between two and one-half and three inches. Janet Burian testified that the difference was two and one-half inches. Irma Divis testified that the difference in level was about three or four inches. There was evidence tending to show that that condition had existed for about two years. Defendant introduced evidence that tended to show that there was no defect in the sidewalk at the place of the accident, but several



witnesses for defendant admitted that one of the slabs was higher than the other. Plaintiff testified that she did not know that there was a difference in the level in the sidewalk at the point in question until she fell; that she caught her foot on "the part of the sidewalk which was about two or three inches higher than the other part" and was thereby thrown to the sidewalk; that she wore galoshes at the time. The evidence for both parties showed that it had snowed during the day of the accident and that there was snow and ice on the sidewalk, and based upon this evidence and also upon a statement by Police Officer Svoboda - who reached the place of the accident a few minutes after it occurred - that upon arriving at the scene of the accident he saw plaintiff sitting on a chair in a doorway and that he asked her what happened and she told him she slipped, defendant contends that plaintiff slipped on the sidewalk because of the ice and snow thereon; that she did not fall on account of any difference in elevation in the sidewalk, "but that her fall was due entirely to snow, ice, sleet and general slipperiness of the walk." Plaintiff testified that she "never took that side of the street very much and did not know of the elevation or the difference in the level of the sidewalk where I caught my foot. I didn't know it was there until I fell." Defendant offered testimony tending to show that plaintiff had walked over the sidewalk in question before the accident. Plaintiff suffered serious injuries as the result of the accident. An X-ray picture, taken at the hospital the day after the accident, showed fractures or breaks in the continuity of the lower-most bone of the pelvis, the ischium on the left side, a square break across the top just where it joins onto the acetabulum or hip-socket and also an irregular diagonal fracture just where it joins onto the pubic bone; also a mottling of the bone and some irregularity of outline.





At the time of the accident plaintiff had Paget's disease. That fact was not known to plaintiff nor her attending physician until after the accident. It appears from the medical testimony that where Paget's disease is present fractures occur more easily than in a case where that disease is not present.

Defendant contends that "the statement in writing served upon the Town of Cicero did not comply with the provisions of 'An act concerning suits at law for personal injuries and against cities, villages and towns approved May 13, 1905.' Ill. Rev. Stat. Chap. 70, Par. 6." Defendant assigns the following reasons in support of the contention: "(a) The notice was not filed with the town clerk within the statutory six month period. (b) It was not filed with the city attorney." While knowledge of the facts by the town will not take the place of the written notice required by the statute, it may be stated, however, that the instant suit is not what is sometimes called a "blind case." Within a few minutes after the accident in question the police squad car of defendant arrived at the scene and the officers talked with plaintiff about her injuries and how the accident happened. After their talk they examined the sidewalk at the place of the accident, took the names of witnesses, called the Town ambulance - which arrived in a few minutes - and gave directions to the man in charge of the ambulance to take plaintiff to the hospital. The testimony of the officers who were called by defendant shows that they made a thorough investigation of the condition of the sidewalk at the place in question.

The statute bearing upon the instant contention is as follows: "Sec. 2. Any person who is about to bring any action or suit at law in any court against any incorporated city, village or town for damages on account of any personal injury shall, within six months from the date of injury, or when the cause of action accrued, either by himself, agent or attorney,

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file in the office of the city attorney (if there is a city attorney, and also in the office of the city clerk) a statement in writing, signed by such person, his agent or attorney, giving the name of the person to whom such cause of action has accrued, the name and residence of person injured, the date and about the hour of the accident the place or location where such accident occurred and the name and address of the attending physician (if any)." (Ch. 70, par. 7, Ill. Rev. Stat. 1939.) While the sufficiency of the statement in writing must be determined from the statement itself, the filing of the statement must be proved, if not admitted, by evidence other than the statement. No point is made that the statements claimed to have been filed do not conform to the requirements of the statute. When objection was made to the admission of the statements in writing the trial court, by agreement of counsel and in the absence of the jury, heard evidence offered by both sides touching the alleged filings of the statements. The trial court found that the statements were filed with the two officials in conformance with the statute, and we approve of that finding.

As to the filing of the statement in the office of the city attorney: Richard M. Spencer, one of the attorneys for plaintiff, testified that he prepared the original notice and three carbon copies of the same; that about 11 a. m. on Friday, September 2, 1938, he went to the town hall of Cicero, Illinois; that when he inquired for the city attorney he was directed upstairs, where he found a man who said that he would receive the notice and file it for Mr. Loyda, the town attorney; that after this man signed the original notice the witness left with him one of the carbon copies. The receipt upon the original notice reads: "Received a copy of the foregoing notice and filed the same in my office this 2nd day of September, A. D., 1938. Fred J. Loyda By -



Jerry J. Brand Town Attorney of the Town of Cicero, Cook County, Illinois." Defendant called as a witness Jerry J. Brousil, who testified that he was duly admitted to practice law; that he was also a clerk in the office of the President of the Town of Cicero. Upon the direct examination of the witness by defendant's attorney the following occurred: "Q. Are you in any way connected with the office of Mr. Fred J. Loyda? A. Fred J. Loyda is our Town Attorney, and he has his office right there with us. Q. Has he ever authorized you to accept notices on his behalf as Town Attorney? A. Yes. He told me to accept notices when he isn't there. I have frequently accepted service of notices and signed receipts for them. Plaintiff's Exhibit 1 for identification bears my signature. I signed that on the date it bears." Upon cross-examination by plaintiff's attorney the witness testified: "I presume that I received a copy of this notice at the time I signed for it. Q. And you filed it in the Office of the Town Attorney of Cicero? A. Yes I gave him the copy. Q. Where was the office of the Town Attorney in September of 1938? A. I presume he was still with us at that time. Q. Well? A. In our office, in other words. It was in the Town hall there and on the second floor." The witness further testified that the man who left the notice with him gave his name as Spencer. Defendant did not see fit to call the town attorney as a witness. Defendant argues that "this service is not within the requirements of the statute. The Act provides and our Courts have held that the notice, or statement in writing, must be served upon the city attorney." Defendant misstates the statute, which provides that the claimant shall "file in the office of the city attorney \* \* \* a statement in writing." As we have heretofore stated, the trial court ruled correctly as to the service upon the city attorney.

As to the contention of defendant that the notice was not filed with the town clerk: As we have heretofore stated, the statute

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does not require that the statement be served upon the town clerk but only requires that it be filed in the office of that official. The testimony of Attorney Spencer, offered in behalf of plaintiff, was to the effect that he entered an office in the town hall of Cicero, on the door of which there was a sign reading, "Nicholas Hendrikse, Town Clerk;" that in the office he inquired for the town clerk and was told that he was not there and they did not know when he would be there; that after talking to a man who gave his name as James Cheney, the witness handed him one of the carbon copies of the notice ~~in writing~~ and asked him if he would give it to Mr. Hendrikse and ask him to file it in his office; that the office of the city attorney was on the second floor of the town hall and the office of the city clerk was on the first floor. Spencer pointed out a man in the courtroom, identified as James P. Cheney, as the man to whom he delivered the notice on September 2, 1938. The witness further testified that at the time he delivered the copy to Cheney he had another copy of the notice and that when Cheney gave his name the witness wrote it on said copy. This copy of the notice was received in evidence and it has upon it, in the handwriting of the witness, the name "James Cheney." Defendant called James P. Cheney as a witness. He testified that he was a clerk in the clerk's office of the town of Cicero, but that on September 2, 1938, he was not in the office; that he left at 6 a. m. that day for a fishing trip to Pickerly Lake, Wisconsin, and did not return until Labor Day; that "no one ever attempted to serve a notice on me in the Watkins case." The witness further testified that he had received signed notices in connection with personal injury cases "about two or three times, maybe." The town clerk testified that at no time had he delegated authority to anyone to take any action or do anything in reference to personal





injury complaints and that "Cheney has no authority to receive papers in personal injury cases. I never delegated that authority to anyone." The trial court thought that it was strange that no person in the clerk's office had authority to receive notices when the clerk was absent, and he proceeded to examine the witness. The following then occurred: "The Court: Who is in charge when you are away or absent from your office? A. Pertaining to matters of this kind, Miss Zak. The Court: Matters of every kind, who takes your place when you are away? A. Well, Your Honor, I am afraid that is a difficult question to answer. The Court: Well there is always somebody in charge there? A. There is always someone in the office, but what - The Court: Well, if a person walked in and says 'I want to leave this paper with Mr. Hendrikse' anyone would take it? A. Yes that is right. The Court: But no authority to sign your name? The Witness: A. That is right. The Court: But if somebody comes in and says 'I want to leave this for Mr. Hendrikse', they would accept it, they would take it and put it on your desk? A. That is just one of the ordinary courtesies." The witness further testified that in his absence "it occasionally happens that one of my subordinates receives the notice, but it is kept for me;" that there was no notice on file in his office corresponding to the notice that Mr. Spencer claims to have served. Mary Zak, testifying for defendant, stated that she was secretary and stenographer to the town clerk; that she was familiar with the files in which the personal injury notices were filed; that she did not find in the files any notice pertaining to plaintiff; that it was a part of her duty to notify the town clerk and the town attorney that notices had been filed with the clerk; that when notices were filed they were not marked "Filed," nor was there any entry made upon any book of the filing. The court saw the witnesses and heard the testimony and he was satisfied that the notice was filed with the town clerk.



We agree with his finding. Mr. Spencer is a reputable lawyer who has had experience in the handling of personal injury cases, and the trial court thought, as we do, that it was exceedingly unlikely that after he had prepared statements in writing for filing in the office of the town attorney and in the office of the town clerk, as the statute requires, he would travel a number of miles from his office in Chicago to the town hall in Cicero and after going to the office of the attorney of the town on the second floor of the town hall and filing the statement in that office would then go down the stairway from the second floor to the first floor and past the office of the town clerk, whose name and title of his office were lettered on the door and whose office was then open for business, without also filing the notice in that office. The trial court did not err in admitting the two notices.

Defendant contends that "a city is not liable for injuries resulting from the general slipperiness of its sidewalks due to the presence of ice and snow which have accumulated as a result of natural causes. The proximate cause of the injury must be an actionable defect in the sidewalk itself." It is sufficient to say in answer to this contention that plaintiff does not base her case upon the theory of fact that she slipped upon the sidewalk because of the presence of ice and snow upon it. Her claim is based upon the theory of fact that she suffered the accident because of a difference in level of the sidewalk at the place of the accident; that she



fell because she caught her foot on "the part of the sidewalk which was about two or three inches higher than the other part," and that the defective condition had existed for about two years. As to the snow and ice plaintiff claims that they tended to conceal the defect in the sidewalk.

Defendant contends that plaintiff was guilty of contributory negligence as a matter of law. This contention is based upon the assumption that the defect was known to plaintiff. Plaintiff testified: "I never took that side of the street very much and did not know of the elevation or the difference in the level of the sidewalk where I caught my foot. I didn't know it was there until I fell." This evidence of plaintiff precludes any finding that she was guilty of contributory negligence as a matter of law. Defendant cites the testimony of three witnesses that before the accident plaintiff had walked with them over the sidewalk at the place in question, and argues that this testimony shows that plaintiff knew of the defect in the sidewalk at the time of the accident. Such evidence merely raised a question of fact for the jury as to whether plaintiff knew of the defect. The jury determined that question in favor of plaintiff.

"The general rule is that negligence and contributory negligence are questions of fact for the jury, and so long as a question remains whether either party has performed his legal duty or has observed that degree of care and caution imposed upon him by law, and the determination of the question involves the weighing and consideration of evidence, the question must be submitted as one of fact. (Chicago, St. Louis and Pittsburgh Railroad Co. v.



Hutchinson, 120 Ill. 587; Austin v. Public Service Co., ante, p. 112.) Before we can say, as a matter of law, that there was no negligence on the part of the defendant or that there was such contributory negligence on the part of the plaintiff as to defeat recovery, we must be able to say that all reasonable minds must agree that the defendant was not negligent in his acts or that the injury was the result of plaintiff's own negligence.' (Petro v. Hines, 299 Ill. 236, 240. See, also, Pollard v. Broadway Central Hotel Corp., 353 Ill. 312, 322, 323.) 'Whether a plaintiff was guilty of contributory negligence is ordinarily a question of fact for the jury to decide under proper instructions. It becomes a question of law only when the evidence is so clearly insufficient to establish due care that all reasonable minds would reach the conclusion that there was contributory negligence. (Thomas v. Buchanan, 357 Ill. 270; Mueller v. Phelps, 252 id. 630; O'Rourke v. Sproul, 241 id. 576.) \* \* \*' (Zirald v. Lynch Co., 365 Ill. 197, 199, 200.)" (Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104, 110, 111.)

"It is contended that appellee knew of the defect in the walk, and was therefore guilty of contributory negligence in going upon it. Although a person passing along a sidewalk may know it is out of repair, he may, notwithstanding such knowledge, recover for a personal injury occasioned by the defective walk if he uses ordinary and reasonable care. (City of Flora v. Naney, 136 Ill. 45.) Whether due care was exercised in using a sidewalk knowing it to be out of repair is a question of fact for the jury. Village of Cullom v. Justice, 161 Ill. 372." (City of Streator v. Chrisman, 182 Ill. 215, 217.)

"A pedestrian upon a sidewalk may ordinarily assume that it is in a reasonably safe condition for travel. To hold a person absolutely bound to keep his eyes fixed upon a sidewalk in search

RESEARCH      IN THE      FIELD OF      THE      ARTS AND      LETTERS

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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Figure 1. The effect of the initial concentration of the monomer on the polymerization of  $\alpha$ -methylstyrene initiated by  $\text{BuLi}$  in THF at  $-78^\circ\text{C}$ . The polymerization was carried out in the presence of 0.01 mole-% of  $\text{BuLi}$  in THF at  $-78^\circ\text{C}$ . The polymerization was carried out in the presence of 0.01 mole-% of  $\text{BuLi}$  in THF at  $-78^\circ\text{C}$ . The polymerization was carried out in the presence of 0.01 mole-% of  $\text{BuLi}$  in THF at  $-78^\circ\text{C}$ .

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of defects and dangerous places would be to establish a manifestly unreasonable and impracticable rule. City of Chicago v. Babcock, 143 Ill. 358." (Graham v. City of Chicago, 346 Ill. 638, 640, 641.)

We hold that defendant's contention that plaintiff was guilty of contributory negligence as a matter of law is without merit.

Defendant contends that "the court erred in permitting the verdict of the jury to stand, it being a quotient or chance verdict and not supported by the evidence;" "the burden of proof is upon the plaintiff and inasmuch as the plaintiff has failed to prove that the fall she took was the proximate cause of both fractures, one of the elements hereinabove discussed has failed of proof and is, therefore, a reversible error. One of the material allegations of the complaint places upon the plaintiff the necessity of proving a causal connection between the injury and the fall. The defendant contends that the preponderance of the evidence presented by the plaintiff fails to show any connection between the first fall, the second fall, the dragging, and the seating on the chair and the injury itself. Defendant respectfully represents that these facts, in and of themselves, were sufficient to cause the lower court to direct a verdict for the defendant and the failure of the Court so to do was a reversible error." (Italics ours.) It is ~~xxx~~ somewhat difficult for us to believe that the argument advanced by defendant in support of this contention is seriously made. Defendant calls attention to the fact that plaintiff had Paget's disease and argues that slight trauma would cause a fracture in that part of her body affected by the disease. Defendant admits that the fall might have caused one or both of the fractures, but it claims that after plaintiff fell she attempted to rise and slipped a second time, and that the second slipping might have caused one or both of the



fractures. In his zeal counsel for defendant misstates the evidence. Plaintiff testified that after she fell she tried to get up but she "just couldn't, and I lay there for some time." Neither the plaintiff nor any other witness testified that after plaintiff fell she attempted to rise and "slipped a second time." Ruby Hicks testified that after plaintiff fell "she lay there for some time and no one assisted her, and then someone came around and tried to pick her up, and they couldn't pick her up and they dragged her in the door, and somebody came and brought a chair." Upon this testimony defendant argues that plaintiff was dragged after the accident and the dragging might have caused one or both of the fractures. Plaintiff testified that after she fell "and while I was lying there I was in terrible pain. The pain was on my left side all the way down (indicating), beginning at my waist ~~line by my hip all the way down (indicating), beginning at my waist~~ line by my hip all the way back (indicating)." The jury found that the fall caused the fractures, and we approve of that finding. The contention of defendant that the court should have directed a verdict for defendant because "the preponderance of the evidence presented by the plaintiff fails to show any connection between the first fall, the second fall, the dragging, and the sitting on the chair and the injury itself," is, of course, without merit. It is conceded that because plaintiff had Paget's disease she was more susceptible to fractures, but that does not affect her right to recover damages in the instant case. In Chicago City Ry. Co. v. Saxby, 213 Ill. 274, 279, 280, we find the following: "Mr. Thompson, in his Commentaries on the Law of Negligence, (vol. 1, sec. 150, p. 145,) says: 'The duty of care and of abstaining from injuring another applies to the sick, the weak and the infirm, as well as to the strong and healthy. When this duty is violated the measure of damages is the injury which results, though this injury may not have followed but for the peculiar physical condition of the person in-



jured, although it may have been thereby aggravated.' In section 151 of the same work (p. 147) it is said: 'It may be stated, generally, that if the negligence of A produces a hurt to B which aggravates a pre-existing tendency to disease in B, the negligence, and not the disease, is deemed, in law, the proximate cause of the injury.'

Defendant contends that the court erred in refusing to give the following instruction offered by it: "(21) If the jury find that the place where the accident occurred was necessarily more dangerous than the ordinary streets and sidewalks, then the plaintiff was required to use more than ordinary care and diligence to avoid accident, and if in such case she failed to use such care and diligence in proportion to the danger, she cannot recover." Defendant argues that The City of Joliet v. Verley, 35 Ill. 58, supports its contention that the above instruction should have been given. The plaintiff in the Verley case obtained a judgment against the City of Joliet and the Supreme court affirmed the judgment. The court in its statement of the case incorporated all of the instructions given to the jury and it appears that the trial court gave to the jury on behalf of the defendant a like instruction to the instant one. As the plaintiff in the Verley case won in the court below she had no occasion to complain of any of the instructions that were given. The instruction before us does not state the law correctly and it would have been highly prejudicial to plaintiff's case if it had been given. We quote from City of Spring Valley v. Gavin, 182 Ill. 232, 234, 235:

"The refusal of the trial court to give instructions 3 and 14 offered by appellant is also assigned as error. Instruction No. 3 is as follows:

"If the jury believe, from the evidence, that the place where the accident in question occurred was necessarily more dangerous, under



all the circumstances of the case, as shown by the evidence, than the ordinary streets and sidewalks, and that by the exercise of ordinary care and prudence this condition of things could have been known by the plaintiff, or was known to him, then the plaintiff was required to use more than ordinary care and caution to avoid the accident, and if he failed to do so, and thereby contributed to the injury, he cannot recover in this suit, and your verdict should be for the defendant."

"This instruction is faulty, in that it tells the jury that under certain circumstances appellee was required to use more than ordinary care and caution. This is not the law. It is true that the care required of a person under circumstances where great danger exists, is, if the same is known to him or could become known by the exercise of ordinary care and prudence, greater than that required where the danger is very slight. But in either case, the care required of him is only the ordinary care to avoid danger commensurate with the peril to which he is exposed. The law is well settled in this State, that where an injury is not willful a party cannot recover for the injury received, unless it appears, from the evidence, that he exercised ordinary care. But in no event is he required to use more than ordinary care and caution to avoid accident. The instruction was therefore incorrect and properly refused. \* \* \*" (See, also, Swalm v. City of Joliet, 219 Ill. App. 123, 128, 129.) Several instructions given to the jury at the request of defendant state the law correctly as to the care required of plaintiff.

Defendant concludes its brief and reply brief with the request that the judgment of the Superior court be reversed. If we are correct in our conclusion that plaintiff filed in the office of the town attorney and in the office of the town clerk a statement in writing that complied with the statute, the request of defendant is without the slightest merit. We may say, however, that even





if defendant had seen fit to ask that the judgment be reversed and the cause remanded for a new trial we would have been compelled, under the record, to deny the request

Defendant has had a fair trial and the judgment of the Superior court of Cook county should be affirmed and it is accordingly so ordered.

JUDGMENT AFFIRMED.

Sullivan and Friend, JJ., concur.



41795

PEOPLE OF THE STATE OF ILLINOIS,  
(Petitioner)

Defendant in Error,

v.

JAMES CROWLEY,  
(Respondent)

Plaintiff in Error.

ERROR TO CIRCUIT COURT

OF COOK COUNTY.

312 I.A. 381

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was found guilty of contempt of court and sentenced to pay a fine of \$100, and he sued out this writ of error to have the judgment order reviewed. He also appealed from the judgment order (McLane et al. v. Romano et al. - James Crowley, Appellant, Gen. No. 41766) and the writ of error and the appeal were consolidated for hearing in this court. Counsel for respondent state that they were uncertain whether a contempt judgment is reviewable by writ of error or by appeal, and therefore they sued out the writ of error and also appealed from the judgment order. We think that the opinion in People v. Kotwas, 363 Ill. 336, warrants us in holding that a writ of error to this court to review the instant contempt judgment does not lie. We have this day filed an opinion upon the appeal (Gen. No. 41766), in which we pass upon the contempt judgment order entered against respondent.

This writ of error will be dismissed.

WRIT OF ERROR DISMISSED.

Sullivan and Friend, JJ., concur.

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41507

EDELMAN BROS., INC., et al.,  
Plaintiffs-Appellees,

v.

CHARLES BAIKOFF et al.,  
Defendants-Appellants.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

312 I.A. 381<sup>2</sup>

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Charles and Paul Baikoff appeal from an order adjudging them and others guilty of violating an injunction entered by the Circuit court October 16, 1936. Several other respondents who do not join in this appeal paid the fines imposed upon them. Charles Baikoff was committed to the county jail for the term of ninety days and fined \$300 and costs. His brother Paul received a sentence of thirty days, no costs being assessed against him.

After protracted litigation between the parties the court on October 16, 1936, entered a decree perpetually enjoining all parties to that proceeding, their officers and agents, "from standing upon, using or occupying the public sidewalks in front of their respective places of business on Halsted Street, in the City of Chicago, or the public sidewalks adjacent, adjoining or contiguous thereto, for the purpose of selling or seeking to sell articles of merchandise to pedestrians or passersby, or in asking for or soliciting trade, custom or patronage of any pedestrian or passersby using the aforesaid public sidewalk, and from making, causing, permitting or allowing to be made upon the said Halsted Street, where the said parties, or any or either of them are engaged in business, or in such close proximity thereto as to be distinctly audible upon such public street, any noise of any kind by crying, calling or shouting, for the purpose of advertising any

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goods, wares or merchandise, or of attracting attention or inviting the patronage of any person to any of the businesses operated by the parties hereto, or any or either of them, and from interfering with or impeding any pedestrian or passerby upon the public sidewalk in front of the place of business of the parties hereto or any or either of them, or the public sidewalk adjacent, adjoining or contiguous thereto;...."

Although Paul Baikoff, one of the respondents herein, was not specifically named in the decree, he was included therein and bound by the provisions thereof as an employee, servant, agent or clerk of Charles Baikoff, by whom he was employed and who was specifically named therein. Moreover, Paul Baikoff admittedly had full knowledge of the proceedings and of the provisions contained in the decree, since he testified that he "knew this injunction that was issued in this proceeding of Edelman versus Baikoff," and admitted familiarity with the specifications for the petition for contempt against him growing out of that proceeding.

After entry of the decree in 1938 a petition was filed on behalf of complainants alleging violations of the injunction by the Baikoffs and others, pursuant to which an order was entered May 27, 1938, finding that the Baikoffs had admitted violation of the injunction. June 16 of that year another petition was filed against the Baikoffs and others reciting the history of the litigation to that date and alleging subsequent violations of the injunction. After extended hearings on the latter petition an order for commitment and fine was entered November 2, 1938, against Paul and Charles Baikoff for wilful violation of the injunction. After entry of the order an oral motion to vacate the sentences and fines therein imposed was made by respondents and continued from time to time. It remained pending until the entry

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of the order from which this appeal is prosecuted, at which time it was vacated by specific provision in the order of March 18, 1940.

In December, 1939, further contempt proceedings were instituted by petition alleging the entry of the original injunction, knowledge thereof by all the respondents and setting forth facts constituting wilful violation thereof by them and others and praying that respondents be adjudged in contempt of court for violation of the injunctive decree. After respondents had filed answers denying the charges made against them, the matter was referred to a master, who, after extended hearings, disclosed by a record of nearly 400 pages, recommended that the Baikoffs and others be held in contempt and punished accordingly.

As ground for reversal it is first urged that the court erred in entertaining the petition for writ of attachment. Respondents' counsel challenges the jurisdiction of the court to enter the orders appealed from on the ground that the petition, by means of which these proceedings were initiated, purported to be brought by a person or entity not licensed to practice before the bar, rather than by an attorney at law. Although it is true that the petition purports to be brought by a corporate complainant, it was in fact presented and filed on behalf of the corporation by duly licensed counsel, whose appearance throughout the proceedings is evident from the many orders entered upon motion made by counsel for complainants. Moreover, the jurisdiction of the court was never questioned in the court below by demurrer, motion to strike or otherwise and respondents, by filing their answers and submitting themselves to the jurisdiction of the court, cannot now be heard to challenge the same. (Autenrith v. Wilder, 155 Ill. App. 545, 548; People ex rel. Rusch v. Schwartz, 284 Ill. App. 38, 43.)



Another ground urged for reversal is that the collection by the master of his fees before ruling on the objections to his report rendered the proceedings invalid and contrary to public policy. With respect to this contention the record discloses that, at the close of the hearing before the master on January 8, 1940, it was agreed by all the parties thereto, in the presence of their counsel, that each complainant, as well as the respondents, would deposit a certain amount with the master on account of fees already accrued for taking and reporting the evidence, and the record shows that the amounts agreed upon were paid by the respondents before complainant Edelman had advanced his share. Moreover, the contention made cannot be seriously entertained because no objection with respect to the collection by the master of a portion of his fees prior to the filing of his report was made either orally or in writing before the master and no exception was raised or argued before the chancellor who considered the report at length. The law is too well established to require the citation of authorities that objections and exceptions, not raised before the trial court, will not be heard for the first time on appeal.

The remaining ground urged for reversal is that the findings of the master are contrary to the evidence. Respondents' counsel devotes only two pages in his brief to this point and does not discuss in detail any of the evidence adduced by complainants. The record shows that, in addition to the testimony of eyewitnesses set forth in detail in an abstract of record of 100 pages, complainants produced motion picture films to corroborate the oral testimony. These pictures were taken at Edelman's direction by a qualified operator and developed under the direction of the assistant manager of the Cine Processing Department of the Eastman Kodak Company, both of whom testified at the hearing before the master



as to the manner in which the pictures were taken, the dates and other necessary qualifying data to make them admissible in evidence. The master certified that the proper foundation was laid for the introduction of the films; that each scene is contained in a separate frame in the film which was normally projected at the same tempo on a screen; and that the legal rules pertaining to the admissibility of a motion picture reel in evidence are no different from the rules pertaining to the introduction of any other photograph. Rather than to point out wherein the evidence is lacking upon which the master predicated his findings and pursuant to which the court entered the decree of contempt, respondents attempt to excuse their violation of the injunction on the ground that competition of other "establishments" rendered it necessary for them to violate the injunction in order to survive; but they cannot be relieved from the obligation of complying with the decree of the court of October 16, 1936, on the ground that it was violated by others. The master heard the evidence at length and was in a position to judge of the credibility of witnesses for the respective parties. From an examination of the abstract we are convinced that the record abundantly sustains his findings. We are of opinion that the court had no alternative except to find respondents guilty of contempt and the sentence and fines imposed upon them should accordingly be affirmed. It is so ordered.

JUDGMENT AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.



41589

PEOPLE OF THE STATE OF ILLINOIS,  
upon the relation of HOWARD A.  
BOENDER,

Plaintiff-Appellant,

v.

WILLIAM F. PROPPER, Supervisor  
and ex officio overseer of the  
Poor of the Town of Thornton,  
Defendant-Appellee.

APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

3121.A.382

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The People of the State of Illinois, upon the relation of Howard A. Boender, appeal from a judgment of the Circuit court dismissing their complaint, and seeking a writ of mandamus to compel William F. Propper, Supervisor and ex officio overseer of the Poor of The Town of Thornton, to submit to the Town Board of Auditors of Thornton Township all claims against the township in connection with the relief administration.

The petition for mandamus, a lengthy document, alleged that Boender was a taxpayer of the Town of Thornton, that chapters 139 and 107 of the Illinois Revised Statutes 1939, from which plaintiff quoted some sixteen sections, required defendant, as Supervisor and ex officio Overseer of the Poor, to lay before the Town Board of Auditors all claims against the township, on whatever account, at or before each of the several semimonthly meetings of the Board of Auditors of Thornton Township; and the petition prayed that defendant be compelled to follow the procedure prescribed by the statute in auditing and paying claims against the relief account, as set forth in the statutes and as directed by the electors of the township pursuant to a resolution calling them into session semimonthly for that purpose. The petition further alleged that the Township of Thornton is required

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DEAR SIR:

I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the proposed amendment to the Constitution of the United States, which provides for the election of the President and Vice President by the electors of the several States. I am sorry to hear that you are dissatisfied with the result of the recent election. It is, however, the will of the people, as expressed by their representatives in the Electoral College, and it is not the duty of the Government to question the validity of their action.

The Constitution of the United States provides for the election of the President and Vice President by the electors of the several States. This system was adopted by the Framers of the Constitution as a compromise between the direct election of the President by the people and the election of the President by the Congress. It was intended to give the people a voice in the election of the President, while at the same time giving the States a voice in the election of the President. The system has been in operation for over 150 years, and it has produced many great Presidents of the United States. It is not the duty of the Government to question the validity of the election of the President and Vice President by the electors of the several States. It is the duty of the Government to uphold the Constitution and the laws of the United States, and to respect the will of the people as expressed by their representatives in the Electoral College.



under the law and does, in fact, sustain its poor, and that the funds which are allocated to the township through the channel of the Illinois Emergency Relief Commission are in aid of and supplemental to the funds of the township as the local governmental unit for the discharge of the township's duty to sustain its own poor. It is not claimed in the petition that defendant misappropriated or misapplied any money or that he did not keep proper accounts; neither is it denied that he refused to permit interested persons to inspect his books or that he had in his possession any money belonging to the town. The petition merely alleged that Propper had failed and refused to comply with section 126, chapter 139 of the Illinois Revised Statutes 1939 (p. 3144) "in having paid out money on all relief claims without presentation of a certificate of the Town Clerk, made after audit, and countersigned by the Supervisor." No instances in which he had made such payment are alleged. In fact, the chief complaint of the relator appears to be that Propper refused to submit his accounts for audit to the Town Board of Auditors twice a month.

To the petition for mandamus, defendant filed an answer demanding strict proof as to Boender's citizenship and status as a taxpayer; he averred that the town did not support its poor; that he had made annual reports to the Town Board of Auditors but not semimonthly reports; that he was governed by the regulations of the Illinois Emergency Relief Commission and that the commission audited his accounts.

Plaintiff's replication alleged that Thornton Township does, under the law, sustain its own poor and denied that relief accounts had at any time been presented to the Town Board of Auditors.

When the matter came up for hearing, the court inquired whether there were any controverted questions of fact, and plain-

[illegible]

tiff's counsel replied that "I really don't believe so, judge. If your Honor would look over the complaint and the answer I don't believe there will be any questions of fact." We may therefore take this as a concession by plaintiff that the facts averred in defendant's answer could not be controverted.

From the record it appears that the only evidence adduced upon the hearing was scant testimony of Boender to the effect that he was an Illinois citizen, that he had resided in Thornton Township for some eighteen or nineteen years, and that he was the owner of property and had been paying taxes on it, without stating where the property was located.

Plaintiff has utterly disregarded the rules of this court by omitting from his brief any concise statement of fact upon which the controversy is predicated but, from defendant's brief, we find a recital of the circumstances essential to a determination of the issues involved. It appears that defendant is Supervisor and ex officio Overseer of the Poor of the Township of Thornton in Cook County, Illinois. The Board of Auditors of the town consists of the Supervisor, the Clerk and five Justices of the Peace. Each of the members of the board receives \$10 for each meeting of the board. Pursuant to resolution the board meets semimonthly. Properly duly filed his reports to the Board of Town Auditors for the years 1938, 1939 and 1940 at the regular annual meetings of the board. The report which he submitted in 1938 was duly approved and the certificate of approval was signed by the Town Clerk and the five Justices of the Peace composing the board, three of whom were the attorneys appearing in this case as counsel for petitioner. The Board of Auditors refused to audit the reports filed by the defendant for the years 1939 and 1940, but ordered them filed without making any specific objections thereto.

It further appears that the Town of Thornton does not support



its own poor. It makes a tax levy of 30 cents for \$100 assessed valuation on taxable property for the care and support of the poor of the township in order to qualify for aid from the State of Illinois through the Emergency Relief Commission, but the proceeds thus realized by tax levy are insufficient and most of the funds necessary for pauper relief <sup>are</sup> allocated by the state through the Illinois Emergency Relief Commission. Defendant has complied with all rules and regulations of the commission and with the law providing for the proper keeping of books of account showing receipts and expenditures of all moneys which came into his hands by virtue of his office as Supervisor. His accounts as Overseer of the Poor have been audited by the commission from July 11, 1936. Although he furnished bond as Supervisor in accordance with article XI, chapter 139, Illinois Revised Statutes 1939 (p. 3141), he did not give a bond referred to in section 18 of chapter 107 of the Revised Statutes 1939 (p. 2384), known as the Pauper Act.

It appears that for almost fifty years it was deemed sufficient that the Board of Town Auditors should audit accounts twice a year. However, in 1938 the electors of the township adopted a resolution ordering defendant to submit all accounts and claims to the Board of Auditors semimonthly, as directed by a majority of the board. Following the adoption of this resolution, a taxpayer obtained a decree in the Circuit court by which the resolution was declared void. The Town Board of Auditors was enjoined from enforcing it and the board appealed to this court. While the case was here pending, the board in April, 1939, at its annual meeting, repealed the resolution, whereupon, on defendant's motion, we dismissed the appeal as involving a moot question. At the next annual town meeting in April, 1940, a similar resolution was re-enacted, and the three counsel who acted for plaintiff



upon the hearing of the mandamus proceeding constituted a majority of the Board of Town Auditors and were, therefore, bound by the injunction. It was then that Boender, alleging that he was a taxpayer and relator in this case, sought by this petition to enforce the resolution of April, 1940, which was in effect the same as the resolution of April, 1938, that was declared void in the Circuit court decree. The trial court, aware of these circumstances, was evidently of opinion that the majority of the Board of Auditors sought by this proceeding to circumvent the injunction of the Circuit court by prosecuting this case through relator, and swept aside the technical considerations presented in dismissing the petition.

The important circumstance underlying this proceeding is that each of the members of the board receives \$10 for each meeting of the board and the court, recognizing this device, indicated in his opinion dismissing the petition that one audit of the disbursing agent was sufficient and that the township ought not to be burdened with the possible expense of some \$1,500 to \$2,000 a month, including clerk's costs, where the administration of emergency relief was involved, "because no substantial benefit could accrue to the township if the defendant's accounts were audited by the Board of Auditors twice a month, as well as by the Emergency Relief Commission."

It is a well settled rule in this state that the writ of mandamus is not a writ of absolute right, but is a writ to be granted or withheld in the exercise of a sound discretion in view of all the circumstances. People v. Wieboldt, 138 Ill. App. 200 (aff'd, 233 Ill. 572); People ex rel. Beardsley v. City of Rock Island, 215 Ill. 488; People ex rel. Stettauer v. Olsen, 215 Ill. 620. In view of this well settled doctrine, we think it unnecessary to discuss the various propositions of law argued in plaintiff's

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brief pertaining to the construction of the numerous sections of statutes cited. In any event, a statute should not be misconstrued so as to produce the result sought by plaintiff or to produce absurd consequences and injustice. People for use of Saline County v. Wallace, 291 Ill. 465; Louisville & Nashville Railroad Co. v. Industrial Board, 282 Ill. 136. The important consideration is that the audits of defendant's accounts have been systematically made by the Emergency Relief Commission or by the Auditor of Public Accounts, with the result that the state officials have assured themselves that defendant's accounts are being properly kept and that his expenditures were made in accordance with his duty under the law. Under the well established rule, the trial court was justified in exercising his sound discretion in denying the petition for writ of mandamus.

Therefore, the judgment of the Circuit court should be affirmed and it is so ordered.

JUDGMENT AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.



41633

SUNBEAM HEATING COMPANY, INC.,  
Plaintiff,

v.

EDWARD W. and MARY C. CHAMBERS  
and GEORGE AND ANNIE TOMES et al.,  
Defendants.

ALBERT E. LAKE,

Petitioner,

PETER A. GROSSO,

Respondent,  
Appellee.

APPEAL OF ALBERT E. LAKE and  
GEORGE and ANNIE TOMES,  
Appellants.

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3121A.382

APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On August 29, 1932, Sunbeam Heating Company, Inc. (hereinafter referred to as plaintiff) filed a bill to foreclose a mechanic's lien against the property known as 55 West Burton Place, Chicago, for the installation of a furnace costing \$412, on which \$120 had been paid on account. The furnace was ordered by Edward W. Chambers and wife, parties in possession. Title to the property was in George Tomes and Annie Tomes, his wife, who had, April 17, 1924, executed a trust deed to the Chicago Title & Trust Company, which was thereafter duly recorded. Albert E. Lake was the owner of the notes secured by the aforesaid trust deed. The complaint to foreclose the mechanic's lien made the holders of the notes parties defendant as unknown owners or holders and there was attached to the complaint an affidavit that the owners and holders of the notes were sued as "unknown owners," that their names were unknown to plaintiff, and "that upon diligent inquiry their names cannot \*\*\* be ascertained." Summons issued August 29, 1932, directed to George and Annie Tomes, Edward W.

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and Mary C. Chambers, Margaret Cullinan, Chicago Title & Trust Company as trustee, and the "unknown owners." Margaret Cullinan and the Chambers could not be found within the jurisdiction. The sheriff's return, dated September 1, 1932, stated that he had served summons on Chicago Title & Trust Company by delivering a copy thereof to Holman D. Pettibone, its president, August 31, 1932; and that he had also served the defendants George and Annie Tomes by leaving a copy of the writ for each of them at their usual place of abode with M. Grandholm (maid), a member of their family, a person of the age of ten years and upward, at the same time informing her of the contents thereof.

March 19, 1937, an affidavit for publication was filed by one of the solicitors for plaintiff, which is not questioned as to its validity and compliance with the statute. Thereafter, April 6, 1937, the Law Bulletin Publishing Company filed a certificate of publication stating that the requisite affidavit for publication having been made, there was published three times in its Law Bulletin, once in each week for three successive weeks, beginning March 20, 1937, and ending April 3, 1937, printed notice to Edward W. Chambers, Mary C. Chambers, Margaret Cullinan and "unknown owners," stating the title, number of the cause, and description of the property, directing them that unless they filed their answers in said suit or otherwise made appearance therein on or before the third Monday of April, 1937, being the 19th day of that month, default may be had against them thereafter and a decree entered in accordance with the prayer of the complaint.

August 12, 1937, an order of default was entered against Margaret Cullinan, the Chambers and "unknown owners," all of whom had been served by publication. On the same date default was likewise entered against George and Annie Tomes, and Chicago Title & Trust Company as trustee, who had been served by summons. At the



same time a decree was entered against all the defendants, including unknown owners, which found in substance that August 26, 1930, Chambers and his wife entered into a contract with plaintiff for installation of a furnace at 55 West Burton place, Chicago, which was completed September 4, 1930; that George and Annie Tomes, who were owners of record of the property, knowingly permitted the work to be done and allowed the persons in possession to make the improvements; that plaintiff was the legal owner of the contract and of lien rights, having furnished the heating plant and installed it, and that the price charged was reasonable; that the installment became a permanent improvement on the property, for which Chambers and wife had agreed to pay \$412 and on which there was a balance due of \$292, with interest from September 4, 1930; that plaintiff had filed the necessary mechanic's lien claim in the office of the clerk of the Circuit court; that all matters in the bill of complaint were true; and that plaintiff was entitled to a mechanic's lien upon the premises. Payment of the balance due, with interest, was ordered to be made within three days, and, in default thereof, the master in chancery was directed to sell the premises at auction, after giving due notice, reimburse himself for his services, deduct costs, and report any deficit or surplus to the court; and in the event that the premises were not redeemed, the master was directed to issue a deed to the purchaser at the sale and it was decreed that all defendants and persons claiming under them should thereafter be barred from asserting any claim, and that upon delivery of the master's deed, the grantee be given possession of the premises.

September 22, 1937, the master filed his report of sale and distribution; he reported that the premises had been sold to plaintiff for \$471.85; that this sum was sufficient to take care of expenses and to pay plaintiff \$394.43 as principal and interest. The master's report of sale was duly approved September 22, 1937.





Thereafter, April 27, 1940, George and Annie Tomes and Albert E. Lake filed separate motions to vacate the decree and were given leave to file their petitions. The order included direction to respondents, Sunbeam Heating Company and Peter A. Grosso, to plead thereto within ten days.

The petition of George and Annie Tomes, which was subsequently amended, recites the filing of the bill to foreclose the mechanic's lien on the property in question; alleges that summonses were issued but not served on them, and that at the August term, 1937, the decree herein sought to be vacated, was entered by the court; that at the time the complaint was filed, they lived at 21 East Division street and were not served with summons nor with a copy of the bill; that they had no notice by mail or otherwise, and that until April 6, 1940, they were wholly ignorant that a complaint had been filed; that immediately thereafter they consulted an attorney, who reported the files lost, and that only part of them were found April 19, 1940; that when the summons was later located, they found it had been served "on M. Grandholm (maid) a member of their family," September 1, 1932; they denied that they had an M. Grandholm (maid) a member of their family on that date, or at any other time, or that any person by that name gave them, on or about that date, a copy of summons in said cause; their petition alleges that great injustice has been done them by the entry of the decree and that if they had been served with process, they would have taken steps to defend the suit and "verily believe [that it] would have been dismissed, or the said decree would have been of a different character than the said decree heretofore entered;" and petitioners ask that the cause be opened for hearing, that they be permitted to plead, answer or demur to the complaint, and that the decree against them be set aside, altered or amended.

The petition of Albert E. Lake likewise recites the filing

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of the complaint to foreclose the mechanic's lien, that part of the files, including the summons, were missing from the clerk's office, that an affidavit of nonresidence as to Lake as an "unknown owner" was filed in the proceeding, notice by publication given, and that August 12, 1937, the decree in question was entered. Lake alleges that at the time of the filing of the complaint and since, he was a practising lawyer in Chicago, with offices at 19 South LaSalle street, that he was not served with summons nor with copy of the complaint, and that he did not receive any notice by mail or otherwise with respect to the pendency of the suit; that he is owner and holder of the notes secured by trust deed to Chicago Title & Trust Company; that until April 8, 1940, he was wholly ignorant that a complaint had been filed to foreclose plaintiff's mechanic's lien or that a decree had been entered; that he was diligent in proceeding after learning the facts; that great injustice has been done to him; and "that, if he had been served with process, or if he had known of the pendency of the said suit, he could and would have appeared .... and verily believes, [the said bill] would have been dismissed or the said decree would have been of a different character than the said decree heretofore entered." He asked that the cause be reopened for hearing and that the decree be set aside, altered or amended.

To these petitions American Radiator and Standard Sanitary Corporation filed its answer, May 9, 1940, averring that plaintiff corporation had been dissolved, and that the American Radiator and Standard Sanitary Corporation had become owners of its assets; that Tomes and wife and Chicago Title & Trust Company were duly served with summons, defaulted, and that a decree was entered in accordance with the complaint; that no motion or petition was filed by anyone within one year after the entry of the decree, by reason whereof it became binding on all the defendants; that the owner and holder of the notes secured by the trust deed was



made party as an "unknown owner" and served by publication; that no public record contains the names of any of the owners or holders of the notes, and, therefore, Albert E. Lake could not have been made a party defendant to the suit by name; that all the proceedings were filed and performed in accordance with the statute, and the petitions to vacate the decree came too late as a matter of law and equity; that the American Radiator and Standard Sanitary Corporation quitclaimed all its right, title and interest to one Peter A. Grosso for good and valuable consideration, and, therefore, it has no longer any interest whatsoever in the proceedings.

Also, May 9, 1940, Grosso, the other respondent, filed his motions to strike the petitions, averring that they failed to disclose equities which would entitle petitioners to relief. As to Lake, it was averred that he became a party defendant under the designation of "unknown owner" but was duly defaulted and failed to avail himself of the opportunity to obtain relief; that Lake's petition failed to state that his ownership was a matter of public record and to allege any facts which would tend to establish any negligence on the part of plaintiff in failing to make Lake a party defendant by name rather than under the description of "unknown owner"; that the decree entered found that the court had jurisdiction of the subject matter and of the parties and that, by reason of the decree of August 12, 1937, Lake was barred from asserting any "pretended equities;" that Lake failed to ask for a modification of the decree within one year, as provided in the Civil Practice Act; that his petition does not tend to establish any error in the record or decree; that the petition neither shows nor alleges that Grosso is not a purchaser for value; that Grosso was not a party to the mechanic's lien foreclosure proceeding and was,



therefore, not chargeable with any of the errors which allegedly intervened in the entry of the decree. It is averred that Grosso bought the property from the holder of the master's deed, and acquired title thereto; that no appeal or writ of error was pending when he bought the property and, therefore, he cannot be divested of any rights therein.

With respect to George and Annie Tomes, Grosso's motion to strike their petition avers, in substance, that they were both defendants, duly served September 1, 1932, and that they failed to interpose any defense in said cause. He repeats the averments that he was not a party to the original proceeding, that he was a purchaser for value, that no appeal or writ of error was pending when he received title to the property through purchase and, therefore, cannot be divested of his rights.

Upon this state of the pleadings, the court, November 13, 1940, heard and considered the separate petitions of George and Annie Tomes and Albert E. Lake, and thereafter entered two separate orders sustaining the motions to strike the petitions. Both the Tomes and Lake join in this appeal to reverse the orders thus entered.

Respondent Grosso takes the position that where a decree affecting the title to property has been rendered by a court of equity, the rights of a purchaser who buys in good faith, relying upon the decree, before appeal or other action is taken to void it, will be unaffected, notwithstanding the decree may afterward be reversed, and several cases are cited in support of this proposition. The authorities to which we are referred are generally to the effect that the title of a bona fide purchaser is good, notwithstanding there may have been errors or irregularities in the proceeding leading up to the decree which rendered it irregular and in consequence of which it might have been set aside or reversed. However,





we are here presented with a different situation. The petitioners insist that if the court had not sustained the motions to strike their petitions, but had permitted them to go to hearing on the issue of whether the court had jurisdiction of the parties by reason of the alleged failure of the sheriff properly to serve summons on George and Annie Tomes, they could have established their claim that the court was without jurisdiction of the party defendants to enter the decree, and that the denial of their right to present evidence tending to show lack of service and, therefore, want of jurisdiction of the parties, constitutes reversible error.

We think this contention is well taken. There is authority for the proposition that a sale made under a decree wholly void by reason of jurisdictional defects confers no title on the purchaser. 35 Corpus Juris 81, par. 126. The decisions on which Grosso relies deal generally with circumstances indicating that the court had jurisdiction of the parties and subject matter, or where a contention was made that the court had no jurisdiction, facts adduced upon hearing led the court to hold otherwise; and in those instances it was generally held that the title of a bona fide purchaser who was not a party to the suit would not be affected by a decree, notwithstanding that there may have been errors in the proceeding to render it irregular, even though the decree was subsequently reversed on appeal.

As early as 1841 it was decided in Buckmaster et al. v. Carlin, 4 Ill. 104, that in relation to judgments, if the court had jurisdiction of the parties and subject matter of the controversy, and the party against whom the judgment is rendered, has had either actual or constructive notice of the pendency of the suit, no error can render the judgment void; but where the jurisdiction of the person or subject matter does not exist, the judgment is a nullity.

Later, in Hedges et al. v. Mace et al., 72 Ill. 472, the



court held that on a bill to impeach a decree and sale under it, nothing could be urged as against purchasers under such decree that does not go to the jurisdiction of the court. (Italics ours.)

In Lambert et al. v. Livingston, 131 Ill. 161, the Supreme court again held that where a stranger to the record becomes a purchaser of land at a foreclosure sale or under a judgment or decree, and has no notice of any errors in the proceeding, the subsequent reversal of the judgment or decree will not affect such purchaser's title or rights provided the court had jurisdiction to render the decree or judgment. (Italics ours.) The court there cited and relied upon Hedges et al. v. Mace et al., supra, quoting therefrom as follows: "The law is well settled, that where the court has jurisdiction of the subject matter and obtains jurisdiction of the person by service of process, then, although errors may intervene, the title of a purchaser under the decree, who is not a party to the proceeding, will be protected." (Italics ours.)

It is fundamental in our law that the court must have jurisdiction of the subject matter and the parties before a valid judgment or decree can be entered against them. In the case at bar, the Tomes in their petition recite that they were not served with summons, that they had no knowledge or notice of the proceeding, that they did not reside on the premises involved, but elsewhere, that they did not have any maid in their employ by the name of M. Grandholm, or any other person who gave them a copy of the summons, and that a mistake was committed by the sheriff in the return. Grosso's motion to strike the petition admitted these facts under the established rule that a motion to dismiss serves the same office as a demurrer and admits all allegations that are well pleaded. Nikola v. Campus Towers Apt. Bldg. Corp., 303 Ill. App. 516. For the purpose of the motion, therefore, respondent admitted that the Tomes were not served and if that be taken as true,



the court did not have jurisdiction over them. Grosso could have joined issue on the ultimate facts as to whether defendants were actually served, and this is the procedure that should have been required by the court.

We have, therefore, reached the conclusion that the order of the court sustaining the motions to strike the petitions should be reversed, and it is so ordered, and the cause is remanded with directions that the motions to strike be overruled; that Grosso be required to answer the petitions and that a hearing be had thereon and the answer thereto, as to the jurisdictional facts; that if the court should ultimately find, after hearing, that no valid service was had upon petitioners, the decree be vacated and set aside in accordance with the prayer of the petitions; or, if the court should find, after hearing, that it had jurisdiction of petitioners, the decree be ordered to stand in full force and effect.

ORDERS OF THE CIRCUIT COURT REVERSED  
AND CAUSE REMANDED WITH DIRECTIONS.

Scanlan, P. J., and Sullivan, J., concur.

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41326

GEORGIA L. WHITE,  
Appellant,

v.

WILLIAM J. WHITE,  
Appellee.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

3121A-383

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order entered February 7, 1940, reducing the amount of alimony to be paid by defendant, William J. White, to his divorced wife, from \$200 a month to \$160 a month. The original decree entered June 26, 1934, granting plaintiff, Georgia L. White, a divorce from defendant and the care, custody and maintenance of the minor son of the parties included a property and alimony settlement, which contained the following among other provisions:

"It is further Ordered, Adjudged And Decreed that the plaintiff, Georgia L. White, receive and retain as her sole and separate property (free of all claims of the defendant, William J. White), all the household goods and furnishings of every kind and description now belonging to the parties hereto and one 1930 Model Buick Sedan; that said William J. White quitclaim all his right, title and interest in and to the property [description follows] subject only to current taxes and existing first mortgage encumbrance of record.

"It is further Ordered, Adjudged And Decreed that said William J. White shall pay to Georgia L. White the sum of Two Hundred and Fifty Dollars \*\*\* per month for her own alimony, maintenance and support money; that said William J. White deposit the sum of Fifty Dollars \*\*\* per month to the credit of William George White in a savings account in the Harris Trust & Savings Bank until such time as said son becomes self-supporting.

"It is further Ordered, Adjudged And Decreed that said

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William J. White shall pay the necessary and usual expenses of his son's University education.

"It is further Ordered, Adjudged And Decreed that William J. White shall establish an irrevocable insurance trust and that he deposit therein all his present insurance policies amounting now to about Forty-five Thousand Dollars \*\*\* and that he keep said policies in force; that said trust agreement shall provide that in the event of the death of said William J. White, one-third of said insurance shall be paid to William George White, his son, and one-third shall be paid to Georgia L. White, his present wife."

On August 5, 1935, an order was entered by agreement reducing the amount of alimony that defendant was required to pay plaintiff from \$250 to \$200 a month and releasing defendant from making the payments by way of deposit of \$50 a month to the credit of his minor son, William George White, as provided in the original decree of June 26, 1934.

On December 8, 1938, upon motion of his attorney defendant was granted leave to file a petition for the modification of the original decree as modified by the order of August 5, 1938, to the end that his alimony payments be further reduced. Plaintiff was granted leave to file her answer to defendant's petition instantler. On the same date plaintiff was granted leave to file her petition for an increase in the alimony payments to be made by defendant. After defendant filed his answer to plaintiff's petition, both petitions and answers were set down for hearing.

On March 23, 1939, an order was entered reducing plaintiff's alimony from \$200 a month to \$150 a month. On April 22, 1939, plaintiff's motion to vacate this order was entered and continued. On January 18, 1940, the foregoing order of March 23,

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1939, was vacated and the aforementioned petitions of the parties for modification and the answers thereto were again set down for hearing. Having heard the evidence submitted and the arguments of counsel in support of the respective petitions for modification, an order was entered by the trial court February 7, 1940, reducing defendant's alimony payments from \$200 to \$160 a month, "retroactive as of December 8, 1938, the date of the filing of said petition," As heretofore shown it is from this order that plaintiff prosecutes this appeal.

On June 26, 1934, plaintiff secured an uncontested divorce from defendant. As has been seen the decree of divorce awarded the family home, household goods and furnishings and an automobile to plaintiff. It required defendant to maintain in force \$45,000 in life and accident insurance policies, one-third of the proceeds of which was payable to plaintiff and one-third to his son, William George White, who was then seventeen years old. The decree also awarded the care, custody and maintenance of said son to plaintiff and required defendant to pay plaintiff \$250 a month for her own support and to deposit \$50 a month for said son until he should become self-supporting. At the time of the entry of the decree defendant's income, which consisted solely of his salary, was \$7,200 a year. Defendant remarried August 9, 1934.

Concerning the order of August 5, 1935, reducing her alimony from \$250 to \$200 a month and releasing defendant from the payment of \$50 a month for his then minor son, plaintiff testified that she had no knowledge of said order and had not agreed to its entry. She further testified that upon being advised by her attorney that defendant was financially embarrassed she did agree to a temporary reduction of her alimony from \$250 to \$200 a month but not by way of court order and that she did not agree to release

1938, when the defendant was 17 years of age, for molesting her. The defendant was given a sentence of 10 years in the State Prison for this offense. The defendant was released on parole in 1942, and has since that time been living in the community. The defendant has been married twice, and has two children. The defendant has been employed in various occupations, and has been a member of the United States Army during the war years. The defendant has been a member of the United States Army during the war years.

On June 1, 1942, the defendant was arrested from defendant's home, and was taken to the family home, where she was held for a period of 10 days. It is reported that the defendant was in a state of shock and was unable to care for herself. The defendant was released on parole in 1942, and has since that time been living in the community. The defendant has been married twice, and has two children. The defendant has been employed in various occupations, and has been a member of the United States Army during the war years. The defendant has been a member of the United States Army during the war years.

Concerning the defendant's record, it is noted that she was sentenced to the State Prison for a period of 10 years in 1938, and was released on parole in 1942. The defendant has been employed in various occupations, and has been a member of the United States Army during the war years. The defendant has been a member of the United States Army during the war years.

defendant from the payments for his son. Notwithstanding her testimony in this regard, plaintiff cannot now be heard to say that the order of August 5, 1935, was not entered by agreement. It was approved on its face by counsel, who was admittedly her then attorney. She knew that she did not receive and that defendant did not make the \$50 monthly payments for his son for a period of over three years after the entry of this order without any protest on her part. She accepted her own alimony payments in the reduced amount for more than three years and did not question such payments until after defendant had moved for a further reduction in her alimony payments on December 8, 1938.

Plaintiff also testified that she received \$60 a month rent from the Elmhurst property awarded her by the decree and that said property produced no net income; that she had no income except about \$40 annually in stock dividends other than the alimony paid by defendant; that her personal living expenses amounted to \$125 or more a month, which included "my rents and my doctor bill and my dentist bill, clothing and insurance;" that "I have not been well since my son left me and went away to school and then married \*\*\* I have never felt well and I have been under the care of a doctor \*\*\* this past year I have been to the doctor several times and he suggests I should go away for a change;" and that "I have been living by myself until my doctor told me to have somebody live with me. He didn't want me to live alone, to get a practical nurse if I could and I could not afford that so I asked my sister to stay with me while I am not feeling well."

The son, William George White, was seventeen years old when the decree of divorce was entered in June, 1934. He attained his majority September 5, 1937. He lived with his mother until September, 1938, when he entered the University of Illinois and he did not live with her thereafter. She supported and maintained him from August 5, 1935 until he went to the University, out of the \$200 a month, which

detention from 1935 to 1938. During this period, he was  
detained in the same place, and he was not allowed to  
leave the place. He was not allowed to see his family  
or to receive any visitors. He was not allowed to  
write or to read. He was not allowed to speak to  
anyone. He was not allowed to move. He was not  
allowed to do anything. He was not allowed to live.  
He was not allowed to die. He was not allowed to  
be anything. He was not allowed to be nothing.

from the time that he was first taken into custody  
properly prepared to face the situation. He was  
about 40 years old at the time. He was a man of  
average height and weight. He was a man of  
average intelligence. He was a man of average  
character. He was a man of average abilities.  
He was a man of average qualities. He was a man  
of average virtues. He was a man of average  
vices. He was a man of average faults. He was  
a man of average weaknesses. He was a man of  
average strengths. He was a man of average  
powers. He was a man of average faculties.  
He was a man of average senses. He was a man  
of average passions. He was a man of average  
affections. He was a man of average desires.  
He was a man of average hopes. He was a man  
of average fears. He was a man of average  
ambitions. He was a man of average dreams.

The son, who was born in 1935, was also  
detained in the same place. He was not allowed  
to see his father. He was not allowed to  
receive any visitors. He was not allowed to  
write or to read. He was not allowed to speak  
to anyone. He was not allowed to move. He was  
not allowed to do anything. He was not allowed  
to live. He was not allowed to die. He was not  
allowed to be anything. He was not allowed to be  
nothing.

was paid to her during that period as her own personal alimony. The son was compelled to leave the University because he could not make the required educational grades. He married May 6, 1939, and an invalid child was born of said marriage. At the time of the hearing the son was twenty-four years old and employed at a salary of \$75 a month. Both plaintiff and defendant testified that because of the son's circumstances, they felt morally obligated to assist him financially and that they contributed money to him at various times.

As already shown, defendant's salary was \$7,200 a year both when the decree was entered in June, 1934, and when the alimony payments were reduced to \$200 a month on August 5, 1935. He testified that his salary was increased to \$8,500 a year in 1936. He further testified that his own personal expenses for 1940 would be \$358 a month, which included \$200 for maintenance and food and clothing for himself and his wife, \$65 for rent, \$35 for automobile maintenance, including garage, \$35 for lunch and parking fees and \$23 for income tax; and that the insurance premium payments which he was required to pay under the original decree would be \$78 monthly. The foregoing items of defendant's estimated expenditures for 1940, which are exclusive of alimony payments to plaintiff, amount to \$5,232 in the aggregate. He also testified that he proposed to pay \$70 a month to his son to aid in the support of the latter's family and for medical care for his invalid child,

Plaintiff contends that the trial court erred in reducing her alimony from \$200 to \$160 a month by its order of February 7, 1940.

The rules of law governing the question presented for determination on this appeal have long been settled and frequently enunciated by the courts of review of this state. The law is well established that a divorced husband who agrees to or accepts an order fixing the amount of alimony to be paid by him, is barred

[illegible]



from urging any subsequent modification of such order which is based on conditions which existed at the time of its entry. Only a subsequent change in circumstances, either in the needs of the one entitled to receive alimony or in the financial ability of the one obligated to pay same, will authorize the modification of an order or decree of alimony. In Cole v. Cole, 142 Ill. 19, the court in passing upon this question said at pp. 23 and 24:

"The application for an alteration or modification of the decree is always addressed to the judicial discretion of the chancellor, and, ordinarily, in the absence of fraud in procuring the decree, the inquiry is, in all cases, whether sufficient cause has intervened since the decree to authorize or require the court, applying equitable rules and principles, to change the allowance. The cases cited, and others in this court, construe the statute as authorizing the interposition of the court where the circumstances of the parties have changed since the former order, and as giving the court power, for causes accruing subsequently, to alter and modify the allowance to meet the changed conditions of the party. It is not intended to continue the right to alter or modify the allowance upon the state of case existing when the decree was entered, or to review the action of the chancellor therein. The parties had their day in court, with the right of appeal if the decree was deemed erroneous, and it cannot be supposed that it was intended that the court should sit in review of its own decrees, or that the same or some succeeding chancellor presiding in the same court should, after the lapse of indefinite time, have power to reverse, alter or modify a decree for alimony upon the facts existing at the time of its entry. This we understand to be the uniform holding in this State and elsewhere. Bishop (Marriage and divorce, vol. 2, sec. 429), says: 'The application for change is founded upon new facts which have occurred since the decree was originally made, and in the absence of new facts the original decree is deemed to be res judicata between the parties, which, like any other judgment, is not to be disturbed on a further hearing.'"

To the same effect are Craig v. Craig, 163 Ill. 176; Helkelkia v. Sonzinski, 223 Ill. App. 30; and Pribyl v. Pribyl, 250 Ill. App. 349.

Having heretofore concluded that plaintiff was bound by the agreed order of August 5, 1935, which reduced her alimony from \$250 to \$200 a month, it is only necessary to consider the facts as shown by the evidence subsequent to that date. Does the evidence disclose such changed conditions or circumstances in the affairs of the parties since August 5, 1935, as warranted the entry of the order of February 7, 1940, reducing plaintiff's alimony from \$200

1. The first of these is the fact that the Government has not been able to secure the necessary funds to carry out its policy of maintaining the value of the pound at its pre-war level. This has been due to a variety of factors, including the fact that the Government has not been able to secure the necessary foreign exchange to purchase the necessary raw materials and other goods from abroad.

THE following is a list of the names of the persons who have been appointed to the various committees of the National Council of the American People, for the year 1934.

The Executive Committee consists of the following members:

Chairman: [Name]  
Vice-Chairman: [Name]  
Secretary: [Name]  
Treasurer: [Name]

The following are the members of the various committees:

Committee on Education: [Names]  
Committee on Labor: [Names]  
Committee on Agriculture: [Names]  
Committee on Industry: [Names]  
Committee on Social Welfare: [Names]  
Committee on Foreign Affairs: [Names]  
Committee on Defense: [Names]  
Committee on Public Health: [Names]  
Committee on Crime: [Names]  
Committee on Unemployment: [Names]  
Committee on Housing: [Names]  
Committee on Transportation: [Names]  
Committee on Communications: [Names]  
Committee on Public Safety: [Names]  
Committee on Civil Liberties: [Names]  
Committee on Women's Rights: [Names]  
Committee on Children's Rights: [Names]  
Committee on Elderly Rights: [Names]  
Committee on Disabled Rights: [Names]  
Committee on Racial Rights: [Names]  
Committee on Religious Rights: [Names]  
Committee on Political Rights: [Names]  
Committee on Economic Rights: [Names]  
Committee on Social Rights: [Names]  
Committee on Cultural Rights: [Names]  
Committee on Environmental Rights: [Names]  
Committee on Human Rights: [Names]

To the same effect are Craig's letters dated 1960-1961.

CONFIDENTIAL

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to \$160 a month?

What was plaintiff's situation according to her uncontradicted testimony? She received no net income from the Elmhurst property. Her ordinary living expenses amounted to \$125 a month. Her health had declined to some extent and she required the services of a practical nurse, whom she could not afford to employ out of the alimony payments of \$150 which defendant made to her from March 3, 1939, to February 7, 1940. She stated that she would make more substantial contributions to the care and support of her son and his family if defendant paid her the amount of alimony properly due her.

What was defendant's situation when he filed his petition for a reduction in plaintiff's alimony on December 8, 1938, and when he testified upon the hearing on said petition on January 26, 1940? He had remarried in August, 1924, and it is fair to assume that he was keeping house with his present wife when the order of August 5, 1935, was entered just as he was keeping house with her on December 8, 1938, and on January 1, 1940. His salary was \$7,200 a year on August 5, 1935, when the agreed order for \$200 a month alimony was entered, and not only was there no decrease in his income subsequent to said date but his salary was increased to \$8,500 in 1936 and remained at that figure until the order appealed from was entered. The only anticipated increased expenditure testified to by defendant that could possibly affect the amount of alimony plaintiff should receive was an additional insurance premium payment of \$7 a month, commencing with the year 1940.

Thus, the only substantial changes in defendant's circumstances since the entry of the order of August 5, 1935, were the increase in his salary and the condition of his son and his family as heretofore set forth. While neither plaintiff nor defendant is under any legal obligation to support their adult son, since he

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has not become a charge upon the state or county, they both testified that they recognized a moral responsibility upon their part to assist him and his family. Plaintiff testified that she would make substantial contributions to her son if defendant is compelled to pay her the amount of alimony she is legally entitled to. On the other hand defendant states that he contemplated contributing \$70 a month to his son during 1940 and thereafter. Of course, the trial court did not and could not in its order of February 7, 1940, require defendant to provide for the support of his son and his family. The condition of the son should and unquestionably does appeal to the consciences of his father and mother, but it is not a matter properly cognizable by the court in fixing the amount of plaintiff's alimony, nor can it be considered as a circumstance affecting plaintiff's right to continue to receive \$200 a month alimony as provided in the agreed order of August 5, 1935.

Other points have been urged and considered but in the view we take of this case we deem further discussion unnecessary.

The order of the Circuit court of February 7, 1940, reducing plaintiff's alimony from \$200 to \$160 a month is reversed and the cause is remanded with directions to dismiss defendant's motion of December 8, 1938, for a reduction in the amount of plaintiff's alimony and to also dismiss plaintiff's motion of the same date for an increase in alimony.

ORDER REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS.

Scanlan, P. J., and Friend, J., concur.



41392

E. S. FRANK,  
Appellant,

v.

NORMAN J. REILLY,  
Appellee.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

312 I.A. 384

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action at law brought by plaintiff, E. S. Frank, on three bonds, each in the principal amount of \$500, against defendant, Norman J. Reilly, the obligor on said bonds, to recover a balance of \$1,265.58 of principal and interest which remains unpaid thereon. Defendant in his affidavit of merits alleged as his defense that the trustee under the trust deed securing said bonds had theretofore instituted a foreclosure proceeding in behalf of all of the bondholders, including plaintiff, in which a decree of foreclosure was entered and a deficiency decree was procured against him, which he asserted was a final adjudication and determination of his liability upon all of the bonds secured by the trust deed, including those bonds upon which plaintiff's claim is predicated. The case was tried by the court without a jury and, after finding the issues in favor of defendant the court entered judgment against plaintiff, who prosecutes this appeal. Defendant has filed no brief in this court.

Upon the trial of this cause plaintiff's three bonds were offered and received in evidence. The complaint to foreclose the trust deed, the master's report of sale and distribution and the decree confirming the sale, all of which documents constituted part of the record in the foreclosure proceeding heretofore referred to, were presented in evidence by defendant.

The parties entered into the following stipulation of facts:

41392

WILLIAM J. HALL, JR.  
Applicant,

v.

WILLIAM J. HALL, JR.  
Respondent.

Mr. Justice William J. Hall, Jr.

This is an appeal from a decision of the

Board, on three counts, the first of which is

against respondent, William J. Hall, Jr., for

to recover a balance of \$1,000.00 from

which remains due to respondent, William J. Hall, Jr.

and to set aside the order of the Board

dated January 1, 1964, in which the Board

proceeded in a summary manner to

find, in which it ordered respondent to

pay to the Board the sum of \$1,000.00

and to set aside the order of the Board

of the Board dated January 1, 1964, in

which it found respondent liable for

the sum of \$1,000.00, and to set aside

the order of the Board dated January 1, 1964,

in which it found respondent liable for

the sum of \$1,000.00, and to set aside

the order of the Board dated January 1, 1964,

in which it found respondent liable for

the sum of \$1,000.00, and to set aside

the order of the Board dated January 1, 1964,

in which it found respondent liable for

the sum of \$1,000.00, and to set aside

the order of the Board dated January 1, 1964,

facts:



"1. Ida Hollman and Herbert Hollman were the original purchasers of the bonds sued upon here numbered 73, 73 and 75.

"2. On November 26, 1938, the said bonds were transferred to E. S. Frank, the plaintiff herein, by a written assignment of that date.

"3. The said E. S. Frank, the plaintiff herein, is holding the said bonds for the convenience of maintaining this suit and is not a purchaser of the said bonds for value.

"4. The balance due on the said bonds up to and including February 9, 1940, is the sum of \$1,265.58.

"5. In the year 1935 a foreclosure proceeding was filed against Norman J. Reilly, the defendant herein, entitled the 'The Live Stock National Bank of Chicago, as Trustee, vs. Norman J. Reilly, et al., Circuit Court Cook County, Illinois, No. 35 C 16358'; that the said Ida Hollman and Herbert Hollman, the owners of the bonds sued upon herein, were named as parties defendant in said proceedings, were served with summons, and filed their general appearance therein;

"6. The said proceeding was filed by the said trustee for the foreclosure of a Trust Deed and for other and further relief upon a bond issue of \$125,000.00, included in which were the bonds sued upon herein, as appears more fully from the bill of complaint which is an exhibit in this case.

"7. On February 20, 1937, a decree was entered in the said proceeding confirming the sale of certain real estate foreclosed therein and entering a deficiency judgment in personam against the defendant herein in the sum of \$79,354.72; that the Master in Chancery, to whom the said cause was referred for the purpose of computing the above sum, included in his computation the sum due upon the said bonds sued upon herein as well as all other bonds secured by said Trust Deed, which finding was con-



firmed by the said decree of said Court. The said decree is an exhibit in this cause.

"8. The plaintiff herein has not made demand upon the Trustee to enforce the said personal deficiency decree against the defendant herein, nor has the said plaintiff tendered indemnification to the said Trustee."

Plaintiff's theory is that "under the general laws and especially under the facts of this case, the entry of a deficiency decree in favor of a trustee, who has foreclosed a trust deed securing a bond issue against the maker, cannot be urged as a former adjudication by the obligor in a suit at law upon the bond."

Defendant's position in the trial court was that the entry of the deficiency decree in the prior foreclosure proceeding in favor of the trustee under the trust deed which secured the bond issue, including plaintiff's bonds, was res judicata as to the instant action.

Plaintiff urges that since defendant failed to show in the case at bar that he was personally served with process or that he entered his appearance in the foreclosure proceeding, it did not appear that the trial court had the necessary jurisdiction of his person in said foreclosure proceeding to authorize the entry of the deficiency decree. This contention is without merit. Since the court had no power to enter the deficiency decree in the foreclosure case unless the defendant in that proceeding had been personally served or appeared, it must be presumed that the court had jurisdiction to enter said deficiency decree.

Plaintiff also urges that there was no identity shown between the parties in the foreclosure proceeding and the parties in the instant case. It is sufficient answer to this contention to say that the deficiency decree was entered against Reilly,

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one of the defendants in the foreclosure proceeding, who is the defendant here and that, while the trustee was the plaintiff in the foreclosure proceeding, he instituted that action in behalf of all bondholders, including plaintiff, and his conduct and management thereof was binding on the bondholders.

We think the recent case of Skolnik v. Petella, 376 Ill. 500, is controlling as to the question presented for determination on this appeal. The appeal in that case was first considered by this court in Skolmik v. Petella, 304 Ill. App. 331. It appeared therein that in 1928 John Roloffs and Ethel Roloffs, his wife were the owners of certain real estate in Cook county and on that date executed and delivered ninety bonds of various denominations evidencing an indebtedness of \$45,000. To secure those bonds a trust deed was executed to the Garfield State Bank, as trustee, of even date with the bonds, which was eventually foreclosed as herein-after stated. After the execution and delivery of these bonds and this trust deed the property, subject to the lien of the trust deed, was conveyed to one Margaret Considine and thereafter by her conveyed to Ciro Petella and Beatrice Petella, his wife. In the last mentioned deed the Petellas expressly assumed and agreed to pay the indebtedness secured by the above mentioned trust deed. The plaintiff in that case was the owner of one of the bonds so secured, the obligation of which was so assumed by the Petellas.

After the Petellas had purchased the property, and after they had made several payments on the principal and interest secured by the trust deed, a default occurred and the trustee foreclosed for the benefit of all bondholders. The Roloffs who had signed the bonds and the Petellas who had assumed their payment were made parties defendant in the foreclosure suit, and were duly served with summons. It is admitted that the court in the foreclosure suit had personal jurisdiction over them as well as over the subject matter in issue. A decree of foreclosure was entered,

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a sale held pursuant to that decree and the plaintiff in the subsequent action at law, as the holder of one of the bonds in the principal sum of \$500 realized the sum of \$100, as a result of the sale in the foreclosure proceeding. Thereafter, on June 22, 1938, the Circuit court of Cook county in which the foreclosure was had entered a deficiency decree against the makers of the bonds, but not against the Petellas who had assumed their payment.

An action at law was then commenced in the Municipal court against Ciro Petella and Beatrice Petella for the balance remaining unpaid on the bond held by Clara Skolnik and it was alleged in the statement of claim filed therein that after giving full credit for all sums realized on the foreclosure, there remained due for principal and interest on the bond in question the sum of \$610. There was a motion to strike the statement of claim setting forth the facts hereinabove disclosed and an answer to the motion to strike not questioning any of the facts, but taking the position that the foreclosure suit did not adjudicate the issues presented by the action at law because, in the foreclosure proceeding, there had been no allegation either seeking or permitting any personal recovery against the Petellas, nor any allegation which would have sustained a personal judgment against them and setting forth affirmatively that Beatrice Petella was made a party to the foreclosure only for the purpose of barring her redemption rights and not to enforce any personal liability on her part by reason of the assumption agreement. Ciro Petella died pending the litigation and the cause proceeded against Beatrice alone.

In that case we said at pp. 333, 334, 335 and 339:

"Plaintiff contends in her brief that 'since the complaint in the foreclosure proceeding did not allege facts which would sustain a finding of personal liability against Beatrice Petella, no issue was made as to her personal liability and consequently, those proceedings constitute no bar to the present action seeking to enforce liability against her.'

"Defendant's theory is that since she was a party to the

a sale held pursuant to the order of the court in the  
subsequent action of 1938, the principal sum of \$100,000  
of the sale in the foreclosure proceeding, on June  
22, 1938, the circuit court of Cook County in which the foreclosure  
was had entered a judgment in favor of the plaintiff, but  
not against the defendant, and the defendant's payment.

An action at law was then brought in the circuit court  
against Ciro Petella and defendant, to obtain the balance remaining  
unpaid on the bond held by Ciro Petella and it was alleged in the  
statement of claim filed therein that after giving full credit for  
all sums realized on the foreclosure, there remained \$100,000 for  
principal and interest on the bond in question the sum of \$100,000.  
There was a motion to strike the statement of claim seeking forth  
the facts hereinabove disclosed and in answer to the motion to  
strike not questioning any of the facts, but asking the position  
that the foreclosure sale of 1938 was valid and the balance received  
by the action at law bearing, in the foreclosure proceeding, there  
had been no allegation either seeking or demanding any personal  
recovery against the defendant, nor any allegation which would have  
sustained a personal judgment against him and seeking forth  
affirmatively that because Petella was not a party to the fore-  
closure only for the purpose of putting him in position rights and  
not to enforce any personal liability of the defendant as a result of the  
assumption agreement. The Petella who put in the litigation  
and the cause proceeded against Petella alone.

In that case we said at pp. 331, 332, 333 and 334:  
"Plaintiff contends in her brief that since the complaint  
in the foreclosure proceeding is more alleged facts which would  
sustain a finding of personal liability against Petella,  
no issue was made as to her personal liability and consequently,  
those proceedings constitute no bar to the present action seeking  
to enforce liability against her."  
"Defendant's theory is that since she was a party to the



foreclosure proceeding and had entered her general appearance therein, the court had jurisdiction to enter a deficiency decree against her and having entered a deficiency decree against the mortgagors and having failed to enter such a decree against her, plaintiff is now barred under the doctrine of res judicata from maintaining this action.

\*\*\*

"Prior to the act of 1865 (ch. 95, sec. 17, Ill. Rev. Stat. 1937 [Jones Ill. Stats. Ann. 83.17]), which authorizes the court in suits in equity directing a decree in foreclosure, to render a decree for any balance that may be found due plaintiff after the sale of the mortgaged premises and award execution therefor, it was necessary to institute a separate action at law for the recovery of such balance or deficiency. The statute confers upon the court the right to grant and upon a plaintiff the right to demand from defendants in a foreclosure proceeding, all the relief that could be secured in a court of law. The act of 1865 was clearly intended to prevent a multiplicity of suits by facilitating the determination in the foreclosure proceeding of all possible pertinent questions between the same parties. It is true that the statute does not make it obligatory upon a plaintiff in a proceeding to foreclose to exercise his right thereunder to demand a personal judgment against the person or persons liable for the deficiency after sale. It is also true that a creditor by note and mortgage may sue at law on the note and in equity to enforce the mortgage lien and that these remedies may be pursued either concurrently or successively, although of course he can have but one satisfaction.

"However, it is insisted that, notwithstanding plaintiff's complaint to foreclose did not allege any facts showing personal liability as to Beatrice Petella or seek a personal judgment against her for the deficiency and even though ordinarily it is not obligatory upon a plaintiff in a foreclosure suit to demand or secure a deficiency judgment against the defendant or defendants personally liable and as a general rule the owner of a note and a mortgage securing same may sue at law on the note and in equity to enforce the mortgage lien, since defendant was a necessary party to the foreclosure proceeding and personally appeared before the court therein and plaintiff did exercise her right under the statute to procure a deficiency decree against the mortgagors and could have procured a similar decree against the grantee, Beatrice Petella, the fact that she could have procured such a decree in the foreclosure proceedings bars plaintiff from maintaining this action.

"In so far as we have been able to ascertain the precise question presented has not heretofore been considered or determined by any court of review in this State.

\*\*\* we think that the doctrine of res judicata is properly invoked by defendant and that plaintiff is precluded from recovery herein. While, as heretofore stated, it is not obligatory for the plaintiff in a foreclosure suit to ask for or to secure a judgment against the defendant or defendants personally liable for the deficiency, in our opinion, if a mortgagee does exercise his right under the statute to procure a deficiency judgment against any defendant so liable, he is bound in that proceeding to also exercise the same right against any other defendant who is a necessary party and who is personally liable and personally before the court, and, if he does not, he should be barred from seeking



a personal judgment in a subsequent proceeding against any such defendant. If a mortgagee does not exercise his right under the statute to demand and procure a personal judgment for the deficiency against any defendant in the foreclosure proceeding he is clearly entitled to pursue his remedy at law against anyone personally liable for the balance due on the mortgage notes or bonds as represented by the amount of the deficiency. On the other hand, it seems to us that if he does secure a personal judgment for the deficiency in the foreclosure proceeding against any defendant therein and it appears that he could have just as readily procured a similar judgment against another defendant in said proceeding and that he did not do so, he should be precluded from harassing the court and such other defendant with another action on the same claim. The issue sought to be litigated here was open to plaintiff in the foreclosure case. It is again raised here for the sole purpose of securing the same relief which plaintiff could have but failed to secure in the former suit."

A certificate of importance and appeal was granted and the Supreme Court in Skolnik v. Petella, supra, in affirming the decision of this court, said at pp. 502, 503, 504, 505, 506 and 507:

"It is conceded by the plaintiff 'that had the pleadings in the foreclosure case alleged the fact that Beatrice Petella had, by the deed conveying the premises to her, assumed and agreed to pay the debt secured by the trust deed sought to be foreclosed, so that her personal liability was in issue, and then the foreclosure decree found the Roloffs, the mortgagors, personally liable, then, as to personal liability on the part of Beatrice Petella (the owner of the equity), the decree would have barred the instant suit.' This concession is in accordance with the statutory provision (Ill. Rev. Stat. 1939, chap. 95, par. 17) giving courts of chancery the power in foreclosure suits, to enter personal judgments for deficiency where the persons liable have been served with summons. The point for decision is, therefore, narrowed to a determination of whether the plaintiff could take advantage of this statutory provision in part, without exercising it in full against all of the persons directly and primarily liable for the payment of the debt secured by the trust deed. Conversely, could the plaintiff take a personal judgment against a part of those personally liable and withhold action, pending further developments, against others who were likewise personally liable. Both the trial court and the Appellate Court held that all claims for personal liability were merged in the deficiency decree and that the plaintiff was without remedy in this suit.

"It is apparent from the briefs on file that the difficulties in disposing of this case have arisen from failure to distinguish between the rules applicable in a case of res judicata as distinguished from cases involving merely an estoppel by verdict. \*\*\* Appellant's position would be well taken if this were a case of estoppel by verdict, but we cannot agree that it falls in that classification. It comes rather within those rules more precisely defined within the broader limits of the law pertaining to res judicata.

"As illustrated by the cases which appellant cites, the rules of estoppel by verdict apply to some fact or issue necessarily determined by the previous litigation and make the determination of that fact or issue conclusive upon those who have once litigated

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it, either in the same or a different cause of action involving either the same or a different subject matter. The principles of res judicata, on the other hand, are limited to one cause of action concerning one subject matter, but are much broader in their scope, taking in not only all that was adjudicated in the prior action, but all that might have been \*\*\*.

\*\*\*\*

Without reiterating the numerous citations in that opinion [Phelps v. City of Chicago, 331 Ill. 80] we call attention to the following language which we deem pertinent to the present case: 'A judgment in ejectment is conclusive against attack, either collateral or direct, as to all questions which could have been raised in the case \*\*\* The rule of res judicata embraces not only what actually was determined in the former case between the same parties or their privies, but it extends to any other matters properly involved which might have been raised or determined. \*\*\* The rule of res judicata or estoppel by judgment, where there is no want of jurisdiction, is operative whether the judgment be erroneous or not. In the ejectment suit the city was served with a summons, it appeared by its attorney and filed a plea. It had a right in that case to raise any question which the court had jurisdiction to determine. One of the questions which the court had jurisdiction to determine was the question of the right of city to be reimbursed in the amount due on the tax deeds. This question was not adjudicated but a judgment was entered that found that the city was guilty of unlawfully withholding from the defendant in error the possession of the premises described in the declaration and that he was the owner of the premises in fee simple absolute in his own right and was entitled to the immediate possession of the same. This judgment embraced not only what actually was determined in the ejectment suit, but it also extended to any other matter properly involved which might have been raised and determined.'

\*\*\*\*

"In the case we are now considering the court, on foreclosure of the mortgage had jurisdiction of the subject matter, with personal jurisdiction of the parties and had express statutory power to render a personal judgment against any one liable for any deficiency over whom it had personal jurisdiction. It may be that the pleadings did not raise the question of Mrs. Patella's liability for payment of the debt, but that is not decisive of the question because the pleadings were under plaintiff's control and they might have done so. In Phelps v. City of Chicago, supra, the pleadings did not raise the question of reimbursement under the tax deed but the claim was nevertheless barred because they might have done so."

It will be noted that in the Skolnik case the question of Mrs. Petella's liability on the mortgage bonds was not raised by the complaint in the foreclosure proceeding and that no deficiency judgment was entered against her. Yet, because she was liable for the debt and her liability might have been alleged in the complaint in the foreclosure suit and a deficiency judgment was procured against



other defendants and might also have been procured against her, it was held that the decree in the prior foreclosure suit was res judicata as to the action at law brought against Mrs. Petella to recover the balance due on one of the bonds involved in the said foreclosure proceeding.

Where, as here, not only was Reilly's liability for the mortgage debt alleged in the prior foreclosure proceeding but a deficiency decree was actually rendered against him, that decree must be held to be res judicata of the instant suit.

As stated by the Supreme Court in the Skolnik case, "piece meal litigation is not permitted and neither the parties nor the courts may be twice vexed with the same cause of action."

The judgment of the Municipal court is affirmed.

JUDGMENT AFFIRMED.

Scanlan, P. J., and Friend, J., concur.

As stated by the Supreme Court in Young v. United States, "where the Government is not permitted to bring the Government into the suit, the Government may be twice vexed with the same case or action." The judgment of the Circuit Court is affirmed.



41434

JOSEPH MALONEY,  
Appellant,

v.

JOHN ROSENBLAD,  
Appellee.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

312 I.A. 384<sup>2</sup>

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

On January 17, 1940, plaintiff, Joseph Maloney, procured a judgment by confession against John Rosenblad, defendant, on a note for a balance claimed to be due thereon of \$771.76. On January 31, 1940, defendant filed his motion to vacate said judgment and thereafter on February 14, 1940, he was granted leave to appear and defend, the judgment to stand as security. After a hearing by the court without a jury, the issues were found in favor of defendant and a judgment order was entered February 26, 1940, which vacated and set aside the judgment by confession entered on January 17, 1940. Plaintiff appeals.

Olaf Persson lived at the home of Mrs. Kathryn Shea for about thirty years, where he died June 27, 1939. Immediately after Persson's death Mrs. Shea notified plaintiff, who is in the undertaking business. Persson's remains were removed by plaintiff to his undertaking establishment. On June 28, 1939, the day following Persson's death, Mrs. Shea delivered all of the decedent's papers and effects to plaintiff. Included in same was a bank book showing deposits to Persson's account in a Chicago bank amounting to more than \$1,900 and written directions to notify Rosenblad in case of the decedent's death. Plaintiff, learning that defendant was in Williams Bay, Wisconsin, telegraphed him that Persson had died. Rosenblad returned to Chicago the next day, July 29, 1939, and he and his wife visited the undertaking parlor to view Persson's remains, which at that time were laid out in a \$775 casket selected by Mrs. Shea.

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THE CASE OF VANDERBILT

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U. S. DEPT. OF AGRICULTURE

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JOHN W. WILSON

no. 162070 no. 162080

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STATE OF TEXAS, COUNTY OF DALLAS.

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to Chicago the next day.

the following list:

did grow out first in

That afternoon Mr. and Mrs. Rosenblad were driven to the cemetery by one of plaintiff's employees, where they selected a burial lot. It was arranged with the cemetery representative that payment for the lot and the vault in which the casket was to be placed would be advanced by plaintiff. When Mr. and Mrs. Rosenblad again visited the undertaking parlor that evening, they, with Mrs. Shea, were invited by plaintiff to join him in his private office. The evidence is somewhat conflicting as to what took place at that meeting. Inasmuch as the only question presented is one of fact concerning what was said and done there, we deem it necessary for a clearer understanding of just what occurred to set forth the evidence somewhat fully.

Rosenblad, called as a witness by plaintiff, testified, "He wanted me to sign a funeral bill \*\*\* and I said, 'Why should I sign that funeral bill for?' \*\*\* I said, 'How much is that bill?' and he said, 'The bill is between ten and eleven hundred dollars,' and I asked him, 'Why should I sign that bill for?' He said, 'So I could draw his money for the funeral' on the bank in Persson's account \*\*\* he told me twice to sign the bill, and I signed it;" and he told me that the reason he wanted me to sign the funeral bill "was because he wanted to go to the bank the next day and draw out the money."

Plaintiff testified that when Mr. and Mrs. Rosenblad and Mrs. Shea came into his office he had on his desk all of the decedent's papers and effects, which Mrs. Shea had theretofore delivered to him; that he showed Rosenblad "all the papers" and the bank book; that among decedent's papers on his desk was a letter "the early part of it was in English and the latter part of it was in a foreign hand;" that defendant said, "Yes, that directs me to take charge of the entire funeral and to draw the money out of the bank and pay all the funeral expenses or any other expenses as soon as possible, or as soon after the funeral



as possible and to send the balance of moneys to" certain relatives of the decedent whose names and addresses in Sweden were stated in the letter; that the early part of the letter read "In case of death, notify John Rosenblad, 1829 North LeClaire;" that Rosenblad "looked at the bank book which contained Nineteen hundred and some dollars;" that he took away with him "This one letter he had in his hand," but he did not state why he was taking it; that "I then asked him what he had done out at the cemetery \*\*\* He said he selected a very nice grave and I said, 'What did it cost?' \*\*\* I had known the cost by that time as the cemetery told me \*\*\* I said, 'I understand it is \$93 - \$94 total at the cemetery' \*\*\* I believe the grave, itself, was \$75.00 and the additional was the opening charge \*\*\* Then I said, 'What will you want to use regarding a box - wooden or cement,' He said, 'Oh, a cement box, of course,' Then I said, 'There are two kinds of cement boxes - there is a cheap one and a better one.' He said he wanted the better one \*\*\* Then I said to him, 'Now regarding the cemetery and those cash items, it has always been our policy that the family would produce the cash to take care of any immediate cash expenditures' \*\*\* so he said, 'Well you take care of it and we will settle the whole bill after the funeral,' so I said 'Now regarding the casket and all the services that have been performed, are you satisfied with them?' He said 'Yes,' and I said 'Now is the time to make a change if you are not thoroughly satisfied with the casket - I am willing to change it right now - no use having an argument about it later.' 'No,' he said, 'That's not too good for him,' and his wife chided in and said the same thing, and then I said, 'So you agree it is satisfactory?' And then I said, 'In order to have me put out this cash, it will be necessary for you to sign this



note which will automatically approve the entire account, and then after the funeral, I shall go with you to the bank and you will take care of the payment of the bill.' He said, 'Yes,' and he signed the note which was part of the contract \*\*\*. In order to have him sign this note or that he would sign the note, he mentioned to me that he insisted upon everything being filled out entirely, and went about talking about the balance of the arrangements for the funeral. 'Now,' I said, 'It will be necessary to have a ~~hearse~~.' I said, 'What will you need in the way of automobiles.' 'Will you need a car - have you a car.' He said 'No.' 'We will need a limousine for ourselves, one for the pall bearers and a hearse.' \*\*\* He said it was very agreeable about the entire bill - he was satisfied."

Plaintiff further testified, ~~that~~ "I said I would ask him to sign that note, which would complete and authorize payment of that entire funeral;" that "he said that was O. K. or words similar to that;" that he then signed the note; that "he told me we would go to the bank after the funeral;" that he (Maloney) believed that by presenting a certified copy of Persson's death certificate to the bank he could "draw that money after Persson's death" to pay his funeral expenses; and that sometime thereafter he turned over Persson's bank book and all of his papers to the Public Administrator.

Following is the itemized funeral bill:

"Account

Estate of Olaf Persson

\*\*\*

To Joseph Maloney, Dr.

FOR THE FUNERAL OF Olaf Persson

MERCHANDISE

Casket

\$775.00

Brought forward  
AUTO LIVERY

\$995.00





|                                     |        |                            |            |
|-------------------------------------|--------|----------------------------|------------|
| Vault, Outside Box or Shipping Case | 100.00 | Hearse Forest Home         | 21.00      |
| Clothing                            | 1.85   | 2 Limousines at \$18       | 36.00      |
| Gloves                              | 3.00   | Flower Cars                |            |
| Decorations: Palms and Ferns        | 20.00  | Removal                    |            |
| Candles and Candelabras             |        | CASH ADVANCES:             |            |
| SERVICE CHARGES                     |        | Church Services            |            |
| Embalming )                         |        | Clergymen                  | 10.00      |
| Personal Services )                 | 35.00  | Cemetery                   | 94.00      |
|                                     |        | State Sales Tax            | 26.41      |
| DEATH NOTICES                       | 18.75  | COMPLETE SERVICE           |            |
| Certified Copies                    | 1.50   | Telegram & Telephone Calls | 4.65       |
| Forward                             | 955.10 |                            | \$1147.16" |

On this funeral bill form, which was 7 1/4 inches "high" and 8 1/2 inches wide, there was other printed matter under the statement of account. Immediately below the statement of account form and attached thereto was the note involved herein, which was about 3 1/2 inches "high" and 8 1/2 inches wide. Between the statement of account and the note the paper was perforated.

Plaintiff filed his claim in the Probate court against the estate of Olaf Persson, where it was allowed to the extent of \$500.

Mrs. Shea testified in behalf of plaintiff that she saw him hand a paper to defendant to sign, but she did not see the latter read it; that she heard Maloney tell Rosenblad that the paper was "Something about the funeral expenses \*\*\* it was supposed to be for the funeral expenses - I didn't pay much attention, but I heard him say the funeral expenses;" and that the note was the lower portion of one big paper.

Defendant testified in his own behalf that he was seventy-two years old and that he was retired after having worked for the Chicago & Northwestern Railway as a car repairman for about forty-eight years; that he knew Persson during his lifetime; that he "saw him six weeks before he died" and before that "I didn't see him for about eight years;" that he went to plaintiff's undertaking parlor on the evening of June 29, 1939, "just to view the body;"



that Mr. Maloney "says he got a funeral bill there and for me to sign so that he could go to the bank and draw the money from Persson's bank account \*\*\* I said, 'Why should I sign that funeral for.' \*\*\* He said so he could get the money from Persson's bank account \*\*\* I signed it;" that the paper he signed was "about nine inches long" and "about five or six inches" wide; that Maloney "pointed his finger on where to sign it and said 'sign there' \*\*\* he said 'sign it there' and put his finger on it;" that Maloney held the paper while he signed it; that plaintiff did not at that time or at any other time ask him "to pay for Olaf Persson's funeral;" that plaintiff did not give him any other papers or letters and did not hand him a letter written partly in Swedish to translate; that he did not read or translate any such letter to plaintiff; that the only paper called to his attention was one which said "if anything happens, to look for John Rosenblad, and it was signed by Olaf Persson;" and that he did not attend Persson's funeral because "I didn't like Mr. Maloney very well - the way he made me sign that funeral bill - I thought of it when I came home and thought if I went down there he might make me sign more bills."

Mrs. Christina Rosenblad, defendant's wife, testified in his behalf that when they were in Maloney's office on the night of June 29, 1939, plaintiff said "'I have a bill here I want to have you sign' and my husband said, 'What must I sign that bill for?' And he told my husband two - three times if he wanted to sign that bill, and my husband say, 'What must I sign that bill for?'" that Maloney answered "To O. K. that bill so that I can get the money from Persson's bank book;" that plaintiff did not ask her husband if he would pay "for the funeral or any part of it;" that she saw her husband "sign a funeral bill;" that he said "Where shall I sign?" and Maloney put his finger on it and said, "Sign there;"

[illegible]

that she heard no conversation as to who was to pay for the funeral; that when they were in Maloney's office that evening, he had all of Persson's papers and a bank book on his desk; that he did not give any of them to her husband; that she did not see any paper written partly in Swedish that Maloney asked her husband to translate; that "there was a little slip<sup>saying</sup> that 'If anything happens to me, notify Mr. Rosenblad' - that's all there was;" that "I told Mr. Maloney why he wanted my husband to sign that funeral bill, and he said to O. K. it, and I said, 'Mr. Maloney, that bill is too big,' and I said, 'You never could get that money out of Mr. Persson's bank book' \*\*\* 'I knew the bank would not pay that much' \*\*\* and Mr. Maloney said 'I am going to have a lawyer and I am going to fight for it.'"

Plaintiff contends that "he established his case by a preponderance of the evidence, by proof of the indebtedness, of the execution of the note, and by the introduction of the note into evidence; that the evidence offered by Defendant is evasive, contradictory and wholly unworthy of belief."

Defendant's position is that if he did sign the note "its execution was obtained by fraud and circumvention" and that "the judgment note was without consideration."

This case presents the rather sordid picture of an attempt to take advantage of the aged defendant. Persson died at Mrs. Shea's home. She notified Maloney and he removed the body to his undertaking establishment. The next day Mrs. Shea delivered the decedent's papers and effects, including a bank book, to Maloney. He knew from the bank book that there was deposited to Persson's account in the bank more than \$1,900. He also knew that a reasonable funeral bill for his services and the materials furnished by him incident to Persson's burial constituted a first charge against the assets of the decedent's estate and that same would be ordered paid by the



Probate court. Plaintiff's "Account, Estate of Olaf Persson," heretofore set forth, was presented and filed in the Probate court, where it was allowed to the extent of \$500, the excess over and above that amount being considered exorbitant for the burial of a person in decedent's station in life. The fact that plaintiff's funeral bill was made out to the account of the "Estate of Olaf Persson" shows conclusively that he intended to look to said estate for payment. The funeral bill of \$1,147.16 for burying a man who left total assets amounting to approximately \$1,900 was unquestionably exorbitant. The decedent did not have a relative in Cook county and but few friends. Defendant was merely a friend of his, who had only seen him intermittently during the eight years prior to his death. In accordance with the directions left by the deceased, defendant was notified of Persson's death and he responded to such notice, coming home from Wisconsin. It cannot be doubted that when Persson wrote the memorandum to notify Rosenblad in case of his death that his purpose was to receive a decent burial and defendant could have had no other purpose in his dealings with plaintiff than to see that the decedent's remains were properly interred.

What about the note? There is no question but that defendant signed it. But what occasion was there for him to assume any financial obligation for the funeral expenses or to sign a note evidencing such obligation? Both plaintiff and defendant knew that Persson had left more than sufficient funds to take care of his burial. There is no evidence in the record that plaintiff ever mentioned to defendant that he expected him to pay the funeral bill or any part of it. Neither is there a particle of evidence that there was an agreement between the parties that the defendant would pay the funeral bill or any part of it. Whether we accept as true plaintiff's testimony that he advised





defendant that it was a note he was asked to sign or whether we accept as true the testimony of defendant and his wife that Maloney requested Rosenblad to sign or "O.K." the funeral bill, the fact remains that plaintiff's admitted purpose in securing Rosenblad's signature was to aid Maloney in having the funeral bill paid by the bank from the funds left in decedent's account. Plaintiff's testimony in this regard was that "it will be necessary for you to sign this note which will automatically approve the entire account, and then after the funeral, I shall go with you to the bank and you will take care of the payment of the bill."

In our opinion plaintiff knew that he could not foist his exorbitant bill upon the Probate court with any hope of having it paid in full. Whether or not Maloney thought that defendant's signature attached to either the funeral bill or the note would lend such color of fairness and reasonableness to his funeral bill that the bank would be impressed sufficiently to pay same out of the funds in the decedent's account is immaterial, but it is material whether or not plaintiff fraudulently procured defendant's signature to the note.

Was Rosenblad's signature to the note procured by fraud and circumvention? We are convinced that it was. Defendant was seventy-two years old and had worked all his life at manual labor. He had no business experience and was not familiar with notes. One large document was presented to him and, according to defendant and his wife, plaintiff insisted that he sign the same to expedite the payment of the funeral bill by the bank. This document was a printed form, the larger and upper portion of which was the itemized funeral bill with the charge for each item and the total charge written in ink, and the smaller and lower portion of which, below the perforation, was a note. Defendant and his wife testified that plaintiff not only insisted that Rosenblad sign or "O. K." the funeral bill, but he pointed to and then "put his finger" at

ST. LOUIS, Mo., Jan. 11 (AP)—The St. Louis Post-Dispatch today said it had learned that the FBI had received information that a man had been seen in the vicinity of the St. Louis airport on Jan. 10.

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... ..

1. The first part of the document is a list of names and their corresponding addresses. The names are: "John Doe", "Jane Smith", "Bob Johnson", "Alice Brown", "Charlie White", "David Green", "Eve Black", "Frank Gray", "Grace Hall", "Henry King", "Ivy Lee", "Jack Miller", "Karen Wilson", "Leo Young", "Mia Fox", "Noah Evans", "Olivia Reed", "Peter Scott", "Quinn Turner", "Rory King", "Sara Lee", "Toby Hall", "Uma White", "Victor Green", "Wendy Black", "Xavier Gray", "Yara Hall", "Zoe King". The addresses are: "123 Main St, New York, NY 10001", "456 Elm St, New York, NY 10002", "789 Oak St, New York, NY 10003", "101 Pine St, New York, NY 10004", "202 Birch St, New York, NY 10005", "303 Cedar St, New York, NY 10006", "404 Maple St, New York, NY 10007", "505 Spruce St, New York, NY 10008", "606 Willow St, New York, NY 10009", "707 Hickory St, New York, NY 10010", "808 Ash St, New York, NY 10011", "909 Sycamore St, New York, NY 10012", "1010 Walnut St, New York, NY 10013", "1111 Chestnut St, New York, NY 10014", "1212 Locust St, New York, NY 10015", "1313 Poplar St, New York, NY 10016", "1414 Magnolia St, New York, NY 10017", "1515 Dogwood St, New York, NY 10018", "1616 Redwood St, New York, NY 10019", "1717 Cypress St, New York, NY 10020", "1818 Juniper St, New York, NY 10021", "1919 Fir St, New York, NY 10022", "2020 Hemlock St, New York, NY 10023", "2121 Larch St, New York, NY 10024", "2222 Alder St, New York, NY 10025", "2323 Beech St, New York, NY 10026", "2424 Elm St, New York, NY 10027", "2525 Oak St, New York, NY 10028", "2626 Pine St, New York, NY 10029", "2727 Spruce St, New York, NY 10030", "2828 Willow St, New York, NY 10031", "2929 Hickory St, New York, NY 10032", "3030 Ash St, New York, NY 10033", "3131 Sycamore St, New York, NY 10034", "3232 Walnut St, New York, NY 10035", "3333 Chestnut St, New York, NY 10036", "3434 Locust St, New York, NY 10037", "3535 Poplar St, New York, NY 10038", "3636 Magnolia St, New York, NY 10039", "3737 Dogwood St, New York, NY 10040", "3838 Redwood St, New York, NY 10041", "3939 Cypress St, New York, NY 10042", "4040 Juniper St, New York, NY 10043", "4141 Fir St, New York, NY 10044", "4242 Hemlock St, New York, NY 10045", "4343 Larch St, New York, NY 10046", "4444 Alder St, New York, NY 10047", "4545 Beech St, New York, NY 10048", "4646 Elm St, New York, NY 10049", "4747 Oak St, New York, NY 10050", "4848 Pine St, New York, NY 10051", "4949 Spruce St, New York, NY 10052", "5050 Willow St, New York, NY 10053", "5151 Hickory St, New York, NY 10054", "5252 Ash St, New York, NY 10055", "5353 Sycamore St, New York, NY 10056", "5454 Walnut St, New York, NY 10057", "5555 Chestnut St, New York, NY 10058", "5656 Locust St, New York, NY 10059", "5757 Poplar St, New York, NY 10060", "5858 Magnolia St, New York, NY 10061", "5959 Dogwood St, New York, NY 10062", "6060 Redwood St, New York, NY 10063", "6161 Cypress St, New York, NY 10064", "6262 Juniper St, New York, NY 10065", "6363 Fir St, New York, NY 10066", "6464 Hemlock St, New York, NY 10067", "6565 Larch St, New York, NY 10068", "6666 Alder St, New York, NY 10069", "6767 Beech St, New York, NY 10070", "6868 Elm St, New York, NY 10071", "6969 Oak St, New York, NY 10072", "7070 Pine St, New York, NY 10073", "7171 Spruce St, New York, NY 10074", "7272 Willow St, New York, NY 10075", "7373 Hickory St, New York, NY 10076", "7474 Ash St, New York, NY 10077", "7575 Sycamore St, New York, NY 10078", "7676 Walnut St, New York, NY 10079", "7777 Chestnut St, New York, NY 10080", "7878 Locust St, New York, NY 10081", "7979 Poplar St, New York, NY 10082", "8080 Magnolia St, New York, NY 10083", "8181 Dogwood St, New York, NY 10084", "8282 Redwood St, New York, NY 10085", "8383 Cypress St, New York, NY 10086", "8484 Juniper St, New York, NY 10087", "8585 Fir St, New York, NY 10088", "8686 Hemlock St, New York, NY 10089", "8787 Larch St, New York, NY 10090", "8888 Alder St, New York, NY 10091", "8989 Beech St, New York, NY 10092", "9090 Elm St, New York, NY 10093", "9191 Oak St, New York, NY 10094", "9292 Pine St, New York, NY 10095", "9393 Spruce St, New York, NY 10096", "9494 Willow St, New York, NY 10097", "9595 Hickory St, New York, NY 10098", "9696 Ash St, New York, NY 10099", "9797 Sycamore St, New York, NY 10100", "9898 Walnut St, New York, NY 10101", "9999 Chestnut St, New York, NY 10102", "10000 Locust St, New York, NY 10103".

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

Page 10 of 11

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24. Jatoš konjurovati i tako: "Mojemu kralju moći"

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TO THE HON. SEC. OF JUSTICE, The Court and the Clerk of the Court, and the Clerk of the Court

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-DISTED DIVISION, "RECEIVED" LETTER IN JAN TO 10000 AIRTEL

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EXHIBIT TO B-10007, SOUTH OAK RD. CHICAGO, ILLINOIS 60648

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...and on the 15th of March, 1961, the same was reported on page 10

Information on this page is for informational purposes only and is not intended to be used for any other purpose.

to give of these all. The same is true of the other side.

NEW REPORT OF THE FBI TO THE JUDICIAL BRANCH, RE: TO MONITOR AND

NOTE: The following information is for informational purposes only and is not to be used for any other purpose.

egretek latorok az ország minden részéről, akiknek célja az ország lakosságának

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the person who is not a member of the family.

"X" is the number of days between the first and last day of the month.

Re "REPORTS" - 1st July" most face of potatoes of 1961. The figures are

the place where defendant should sign. As already stated the itemized funeral bill and the note constituted one instrument, with the former above the latter, and by putting his finger on the paper to indicate where the signature should be written, it was not a difficult matter for plaintiff to deceive defendant into believing he was merely approving the itemized funeral bill by placing his signature thereon.

In any event, even according to plaintiff, there was no meeting of the minds of the parties such as is necessary for the making of a valid contract. There was sufficient money available in the estate of the decedent to pay his funeral bill and plaintiff was compelled to admit that he never discussed with Rosenblad any possible responsibility or liability on the part of the latter for the payment of said funeral bill. It clearly appears that both parties contemplated that plaintiff would look solely to <sup>the assets in</sup> decedent's estate for the payment of his bill.

Convinced as we are that there was no consideration for the note upon which this action is based and that defendant's signature thereto was procured by fraud and circumvention, the judgment of the Municipal court of Chicago should be and it is affirmed.

JUDGMENT AFFIRMED.

Scanlan, P. J., and Friend, J., concur.



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General number 9234.

312  
Agenda number 2. 4

IN THE APPELLATE COURT  
OF ILLINOIS

THIRD DISTRICT

OCTOBER TERM A.D. 1941.

INDUSTRIAL ROOFING COMPANY, : APPEAL FROM THE CIRCUIT COURT  
a Corporation, and :  
INDUSTRIAL ROOFING COMPANY, : OF COLES COUNTY.  
a Corporation, doing business :  
under the name and style of :  
CONSTRUCTION MATERIALS :  
COMPANY, :

Plaintiffs-Appellees, :

-vs- :

CORA MEEK, :

Defendant-Appellant, :

G. W. PIATT, LONNIE PIATT and :  
DELBERT PIATT, Copartners, :  
doing business under the :  
name and style of G. W. :  
PIATT & SONS, :

Defendant-Appellee. :

812 I.A. 653  
HONORABLE JASPER PIATT,

Judge Presiding.

HAYES, P. J.

Cora Meek has appealed to this Court from a decree of the Circuit Court of Coles County, foreclosing liens of the Industrial Roofing Company, and G. W. Piatt & Sons, for material and labor used in the construction of a house.

In September, 1937, Mrs. Meek entered into a contract with G. W. Piatt & Sons, contractors, for the erection of a house. A contract price of thirty eight hundred (\$3800.00) dollars was agreed upon, of which twenty five hundred and seventy dollars (\$2,570.00) has now been paid by Mrs. Meek. Work was completed on the house in May, 1938. On July 15, 1938, the Industrial Roofing Company

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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1. *Journal of the American Medical Association*, 1997; 277: 1039-1043.

2. *Phragmites australis* (Cav.) Trin. ex Steud.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

• *Geographical location* – the location of the business in relation to its customers and suppliers.

• 3 •

served notice upon Mrs. Meek, of a Claim for Lien, for materials furnished Piatt & Sons, with her knowledge and consent, which had not been paid for. The following day they commenced suit to foreclose their lien making Mrs. Meek and Piatt & Sons defendants. On September 15, 1938, Piatt & Sons filed a claim for lien in the office of the Clerk of the Circuit Court for the balance of the contract price remaining unpaid, and for ninety five (\$95.00) dollars additional, for extras. With their answer to the complaint of the Industrial Roofing Contract they filed a counterclaim against Mrs. Meek, praying foreclosure of their lien. Mrs. Meek filed answers to the complaint and counterclaim, and also filed a cross complaint against both Piatt & Sons and the Industrial Roofing Company, alleging defective performance of the contract. The Circuit Court found that Piatt & Sons' performance of their contract had been defective in certain respects and allowed Mrs. Meek a set-off in the sum of four hundred and sixty dollars and seven cents (\$460.07). It further found that there was due under the contract a balance of eight hundred sixty four dollars and ninety-three cents (\$864.93); five hundred and ten dollars and sixty-nine cents (\$510.69) to be paid the Industrial Roofing Company and three hundred fifty-four dollars and twenty-four cents (\$354.24), to be paid Piatt & Sons. The Court ordered a sale of the property unless these sums with interest were paid.

It is clear from the record that Piatt & Sons did not literally comply with the terms of their contract. Under the mechanic's lien act, as interpreted by the Courts of this state, where substantial performance of a contract is upon a contractor, he is entitled to recover the contract price, plus the cost of extras, less any necessary expenses incurred by the owners in fulfilling the terms of the contract.





3.

Kleinschnittger v. Dorsey, 152 Ill. App. 598; Ruddy v. McDonald, 244 Ill. 494. Thus the principal issue before us is whether Piatt & Sons substantially fulfilled the terms of their contract.

Mrs. Meek has alleged numerous defects in construction, which she claims show a departure from or defective performance of the contract provisions. Only two of them are of major importance, however. It is claimed that the contractor attached her drainage system to an abandoned city drain and that as a result thereof, her basement has been flooded. In the first place, it should be noted that the written contract makes no provision for drain connections, although the contractor did provide a drainage outlet without extra charge. The record shows that the floor of the basement, as constructed by the contractor, was considerably lower than the recognized city drain under the street bordering Mrs. Meek's property, making it impossible to establish a connection with that drain. Mrs. Meek's contract provided that the basement should have at least six and one-half feet of head room, and it appears that it was so constructed. There is also testimony in the record that Mrs. Meek herself directed the depth to which the basement should be dug, and indicated that she did not want to incur the expense of digging under the pavement to make a drainage connection. On the other hand Mrs. Meek testified that she did not supervise in any way the construction of the basement or the drain. Because of this conflict in the evidence,-- and more particularly because there are grave doubts as to whether Piatt & Sons were contractually bound to construct the drainage connection, we do not believe that the Trial Court could have properly



4.

found that they had failed to substantially perform their contract in this respect.

Mrs. Meek also contends that the contractor intentionally departed from the terms of the contract by specifying the joists in the house further apart than sixteen inches from center, as called for by the specifications. It is clear from the record that at least some of the joists were spaced more than sixteen inches apart from center, although there is no evidence as to the number so spaced. It is also contended that the joists supporting the garage roof were likewise spaced more than sixteen inches apart from center, causing the roof to sag. As far as the joists in the house are concerned, we do not believe that Mrs. Meek has shown that the contractors' failure to follow specifications has caused her any damage. Indeed the record indicates that the house is sufficiently supported, and that in fact deviations from the plans were made in order to more substantially construct places where strain would be expected.

While the provisions of the contract concerning the garage contain no express provisions as to the placing of the supports beneath the roof, Mrs. Meek apparently contends that the paragraph on 'joists' applies, and that they should have been placed sixteen inches apart from center. There is another provision in that paragraph however, which states: "rafters to be 2x6s placed 24" on center, grade #1." While it was not clear that this paragraph 'joists' in the contract was intended to apply to the garage, the phrase quoted above seems just as applicable as the one relied upon by Mrs. Meek. In view of this ambiguity, it can hardly be said that Platt & Sons failed to substantially



5.

perform their contract because they placed the supports under the garage roof twenty-four inches apart.

Mrs. Meek has pointed out numerous other alleged defects and we have examined the evidence relative to them very carefully. Most of them are defects that have already been remedied and the Court below allowed Mrs. Meek a set-off to recompense her for the money so expended. Some of the defects were caused by changes in the original plan that she insisted upon. Such changes, of course, cannot be made the basis of a claim that the contractor has failed to perform his contract. *Erikson v. Ward*, 266 Ill. 259.

Mrs. Meek also argues that because the lien claimants failed to prove the cost of remedying the defects in their performance, they cannot recover, even though the evidence shows that such performance substantially fulfilled the terms of their contract. While it is true that a statement to this effect appears in *Art Craft Re-Roofing Company v. William Williams*, 264 Ill. App. 477, that statement was not necessary to the decision therein, and we do not believe it represents the law of this state. Indeed the greater weight of authority places this burden of proof upon the owners, where we believe it properly belongs. *Kleinschnittger v. Dorsey*, *supra*, *Miller v. Calumet Lumber & Manufacturing Company*, 121 Ill. App. 56.

We believe that the Circuit Court reached a correct and equitable result in this case. Having found that Piatt & Sons substantially performed their contract, it properly sustained their lien and the lien of the Industrial Roofing Company in the sum of the unpaid balance due on their



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contract plus extras, less the amount proved by Mrs. Meek to have been expended to remedy defects. While these defects are numerous, most of them are not serious and the more important ones can all be traced to the ambiguities in her contract, which, in the absence of evidence to the contrary, it must be assumed she signed with full knowledge of its contents.

The decree of the Circuit Court of Coles County is therefore affirmed.

DECREE AFFIRMED.

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BERNHART KARP,

Appellee,

v.

HAROLD J. FINDER,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

3121A. 6-4

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

Defendant Harold J. Finder brings this appeal from a judgment entered in the Circuit Court in favor of plaintiff Bernhart Karp for \$3,642.28 and costs. Plaintiff's suit was brought on a written guaranty. The cause was tried without a jury and judgment was entered on the court's finding.

There does not seem to be much, if any, dispute as to the facts. Defendant is an attorney and plaintiff was his client. It appears that defendant sold plaintiff a note with coupons attached thereto, secured by a trust deed on some real estate; that at the time defendant sold plaintiff the note and mortgage, he also gave him a letter or guaranty reading as follows:

"May 24, 1928.

Mr. Bernhart Karp,  
2102 N. Albany Ave.,  
Chicago, Ill.

Dear Sir:

Confirming my conversation with you, this is to advise you that I guarantee the prompt payment of the 18 notes, 17 each for \$50.00 and the last note for \$2600.00, dated May 18, 1928, payable one note each month, with interest at the rate of six per cent per annum, payable monthly, made by Charles Tomaszewski and Tedomya Tomaszewski, payable to the order of bearer and secured by trust deed on premises known as 3618-20 N. Marshfield Avenue, Chicago.

These notes are payable on the 18th day of each month, beginning June 18th, 1928 and if any one of these notes should not be paid on the date of its maturity, I will ask you to mail it to my office and receive payment from me.

Very Truly yours,  
(Sig.) H. J. Finder."

Defendant contends that the foregoing letter was merely sent as an accommodation, although several payments were made thereon by the so-called guarantor Finder.

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## 5.5.3. THEOREM

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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103197 ; MC 68-10000-2 : JUNE 1971 : 82,948,38

Warrant. The case is expected to be heard in court.

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1936, 1937

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the so-called "green" line.

It is quite difficult to determine just what is the theory of each party to this suit. Appellant's brief sets forth plaintiff's theory as follows:

"The evidence discloses two theories upon which plaintiff bases his right of recovery: (1) That plaintiff purchased the mortgage in question from the defendant and that the letter of guaranty was given contemporaneously with, and in consideration of, the purchase thereof; (2) that defendant was a fiduciary and owed a duty to protect plaintiff against loss, and that the letter of guaranty was given in the performance of that duty."

Continuing appellant's brief states:

"It is the defendant's theory (1) that plaintiff did not purchase the mortgage from the defendant but from the parties to the escrow; (2) that except as escrowee, the defendant had no interest whatever in the mortgage or in any matter in relation thereto; (3) that plaintiff purchased the mortgage on May 18, 1928, and that the letter of guaranty was given to plaintiff six days after the purchase was, as a matter of law, consummated, and that there was no consideration for the guaranty; (4) that the letter of guaranty was given gratuitously, as a personal favor to plaintiff, and not as a matter of duty."

As previously stated, the cause was tried before the court without a jury and defendant contends that the court erroneously permitted certain evidence to be introduced. This court in the case of People v. Elbert, 217 Ill. App. 394, at page 399, said:

"The hearing was before the court and it will be presumed that no improper evidence was considered in determining the issues. The error so committed was harmless."

In Doubet v. Doubet, 196 Ill. App. 289, the court at page 302, said:

"Some objection is made to the action of the court in ruling on the evidence, other than above noted; but none was rejected that would have been of material benefit to the appellant, and in a hearing before the court, without a jury, he can hardly err in admitting incompetent evidence."

From a review of the evidence presented in this case for our consideration, it appears that the guaranty was made simultaneously with the sale of the mortgage. Finder, the attorney, had his client's money in his hands and some of it he used in payment of the mortgage. Payment of the purchase price by the plaintiff was sufficient consideration for the guaranty and even if defendant did not personally receive the money, he benefited from it.



In Foley v. Friestedt, 178 Ill. App. 637, defendant sold his wife's building and at the same time guaranteed the lease of one of the tenants. The court at page 637, said:

"The defendant insists that, no consideration being received by him for the execution of the said guaranty and the only consideration for the conveyance of the said premises and the assignments of the said leases being the contract price for the purchase of said premises paid by the plaintiff to Mrs. Friestedt, and the said guaranty not being required by the said contract, it was without consideration and there could be no recovery thereon. The guaranty was made by the defendant simultaneous with the conveyance of the said premises and the assignments of certain leases pertaining thereto to the plaintiff, for which she paid to Mrs. Friedstedt the consideration of \$23,750.00. We think that the case is controlled by the rule announced in Haven v. Chicago Sash Door & Blind Co., 98 Ill. App. 92, wherein the Court say on page 101: 'The rule in regard to guaranty is, that if the guaranty is simultaneous with the execution of the contract guaranteed, the consideration for the contract is a consideration for the guaranty.'"

We do not find that any substantial error has been committed by the trial court in determining the facts and the law applicable thereto.

For the reasons herein given the judgment of the Circuit Court is hereby affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND BURKE, J. CONCUR.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States.

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There is hereby affirmed,  
for the purpose of the law,  
that the person named in the  
affidavit is hereby affirmed,  
by the said court to be  
the person named in the  
affidavit, and that he  
is not the same person as  
the person named in the  
affidavit.

1. 1990-1991

41593

BERNHART KARP,

Appellee,

v.

HAROLD J. FINDER,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY,

ON REMANDING

312 L.A. 654<sup>2</sup>

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

This action was brought in the Circuit Court of Cook County upon defendant's written guaranty of the payment of certain mortgage notes purchased by the plaintiff. The court without a jury heard the cause and rendered judgment for plaintiff for \$3,642.28. This appeal is from that judgment.

Plaintiff purchased at the office of the defendant a third mortgage in the amount of \$3,450.00 and paid therefor the sum of \$3,150.00. There were 18 mortgage notes, numbered 1 to 17, both inclusive, for \$50.00 each and number 18 for \$2,600.00, all with interest at six per cent. The notes and trust deed securing the same were executed by Charles and Tedoza Tomaszewski on May 18, 1928. The first nine or ten notes were paid by the makers and, thereafter, the makers defaulted in payment. The defaulted notes were presented to the defendant and several sums of money were paid by him to the plaintiff. Note number 18 bears an endorsement written by the defendant: "Received \$603.00 on this note from Finder." Several years elapsed after the last payment before plaintiff placed the mortgage papers and guaranty into the hands of a lawyer. After some correspondence then, this suit was filed.

The defendant, an attorney, seeking to reverse the judgment of the trial court, contends that the moneys given by him to the plaintiff were not in payment of the notes pursuant to the guaranty. He claims that the moneys were advancements to

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aid the plaintiff in the latter's financial difficulties. His claim is made although the sums paid were generally the exact amounts of principal and interest due on the notes, and despite the fact he received from plaintiff no note or I. O. U. as evidence of the advancements. Plaintiff insists that the moneys were paid by the defendant under his guaranty obligation and in payment of the defaulted notes.

The evidence shows that the plaintiff and defendant were friends for many years; that the latter had been plaintiff's attorney and was at the time of the mortgage sale plaintiff's agent for collection of certain rents. Plaintiff claims that he, at the time of the transaction, had never seen the property but was induced to make the purchase by, and relied upon Finder's guaranty. The defendant asserts that the guaranty was simply an accommodation to the plaintiff, made for the purpose of appeasing the latter's wife.

The defendant further contends that the mortgage transaction was consummated on May 18, 1928; that the guaranty was given plaintiff later on May 24, 1928, and that it was without consideration and not enforceable against him. These contentions are made although the evidence shows delivery to the plaintiff of some of the mortgage papers several days after May 18th and payment by plaintiff of \$1100.00 to the defendant on May 24th. Plaintiff, on the other hand, maintains that the mortgage was purchased and the guaranty given on May 24th; that no part of the transaction was had on May 18th despite the following receipt signed by him:

"The above described notes received from B. B. Corp. escrow 5/18/28."

There is great conflict in the testimony of the several other witnesses on the question of the time of the mortgage transaction.

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In addition the parties disagree as to the manner of payment of the purchase price for the mortgage. Both agree that the original payment of more than \$1700 was made up of accumulated rents held by defendant for plaintiff. As to the balance, defendant says he advanced it from his own funds on May 18th and that later, on May 24th, plaintiff reimbursed him in part by paying him \$1100.00. The plaintiff, under his theory that the transaction was begun and completed May 24th, maintains that the \$1100.00 was paid directly upon the balance due thereon.

While the defendant claims several errors, we believe the vital question in this case is whether there was consideration for the guaranty. There are two phases of this question; first, whether the defendant gave the guaranty as an accommodation to appease plaintiff's wife, or as an inducement to plaintiff to purchase the mortgage; secondly, whether if as an inducement the guaranty required an independent consideration to support it. Upon the first phase there is the testimony of the defendant Finder, Attorney Mroz and Miss Pachyn, stenographer. The trial court heard and observed these witnesses and after considering all the evidence in the case, we cannot say that its decision on this controversy was clearly against the weight of the evidence. It is evident from the briefs submitted by the parties hereto that they considered the second phase of this vital question a determining factor. To sustain the judgment of the trial court, plaintiff upon this phase of the case cites Foley v. Friedstedt, 178 Ill. App. 636. He contends that under the rule in that case the payment of the purchase price for the mortgage was sufficient consideration for the guaranty since the entire transaction took place on May 24th. The defendant insists that under the rule in that case, his guaranty to be valid, must have been given to Karp simultaneously with a delivery of the mortgage papers; that since his guaranty was given several days after such delivery, an independent con-



sideration was required for it and because there was no such consideration the guaranty is unenforceable. He also relies upon the case of Haven v. Chicago Sash, Door & Blind Co., 96 Ill. App. 92 to sustain his further contention that payment of all or part of the purchase price subsequent to the delivery of the thing purchased is not legal consideration for the guaranty. The plaintiff disputes defendant's interpretation of the Haven case and the contention of the defendant based thereon.

We believe that a study of the rule announced in the Haven case will settle the dispute. In that case the bond sued upon was given ten days after the principal contract was executed and unconditionally delivered. The court holding that there was no consideration for the bond, said at page 101:

"The rule in regard to guaranty is, that if the guaranty is simultaneous with the execution of the contract guaranteed, the consideration for the contract is a consideration for the guaranty; but, if the guaranty is so long subsequent to the execution of the contract guaranteed that it cannot be said to have been a part of the original transaction, the consideration for the contract will not support the guaranty. In such case there must be a new and independent consideration."

That rule controlled the court's decision in Foley v. Friedstadt, 178 Ill. App. 636, and is the rule which must decide the case at bar. We need not, therefore, attempt to reconcile the conflicting evidence to determine whether Karp, plaintiff, paid over the entire purchase price on May 24th or paid part on May 18th and the balance on May 24th, or whether Finder advanced part of the purchase price on May 18th and was later reimbursed by Karp. It is clear from the evidence that even if part of the principal transaction took place on May 18th, it was not completed until May 24th, if then. We believe that Finder's guaranty is part of, and was not made subsequent to, the original and principal transaction. Under the rule discussed above, the consideration paid by plaintiff supports both the sale of the mortgage and the defendant's undertaking. The guaranty is, therefore, valid and enforceable against Finder.

(1) 凡在本市行政区域内从事经营活动的个体工商户、企业法人及其他经济组织，均须依法缴纳工商管理费。

[illegible]

100-443887-1097 2010-09-13

1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

THE UNIVERSITY OF CHICAGO LIBRARY

The defendant claims error on the admission of evidence to prove a fiduciary relationship between plaintiff and defendant for he says such a relationship was not alleged in the pleading. Plaintiff denies any attempt to make such proof and claims that the testimony was permissible to show the friendship which led plaintiff to enter into the contract.

We find no error in the admission of the testimony complained of nor in the action of the trial court upon the related points assigned as error by the defendant. The cause was tried by the court without a jury and we must presume the trial court considered only competent evidence in arriving at the judgment rendered. People v. Albert, 217 Ill. App. 394.

For the reasons herein expressed the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, J. CONCURS;

KILEY, J. TOOK NO PART.

The Government is a party to the  
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41697

REILLY TAR & CHEMICAL CORPORATION,  
a corporation of Illinois (now  
THE REILLY CORPORATION),

Appellant,

v.

FRANCIS J. LEWIS,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

312 I.A. 654<sup>3</sup>

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On April 24, 1933, plaintiff filed its declaration against Francis J. Lewis and William H. Lewis, and on June 25, 1936, plaintiff filed its amended declaration. In the amended declaration the cause was discontinued as to William H. Lewis. The action was upon a contract and plaintiff alleged that defendant agreed to pay one-half of certain income taxes claimed by the United States Government against plaintiff and defendant upon settlement of the claims, and that settlement was accordingly made. After the court overruled a demurrer to the first count of the declaration, issue was joined. The trial was commenced on May 9, 1938. At the close of plaintiff's proofs the court sustained defendant's motion to direct a verdict and judgment was entered against plaintiff, who prosecuted an appeal to this court. In an opinion filed on October 25, 1939, (301 Ill. App. 459), we held that plaintiff made out a prima facie case. "e reversed the judgment and remanded the cause. The cause was redocketed and the second trial commenced on October 14, 1940. On October 25, 1940, during the argument to the jury, defendant was granted leave to file "an amendment to the defendant's special defenses," which reads:

"And for further defense this defendant says that the alleged agreement set forth in plaintiff's declaration was cancelled and rescinded by the mutual consent of the parties to the said alleged agreement on or about June 20th, 1928, and before any of the alleged parties to said agreement had acted thereon."

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The trial resulted in a verdict against plaintiff. The court overruled plaintiff's motion for a new trial and entered judgment on the verdict for the defendant. This appeal followed. We refer to our opinion in the previous appeal to avoid repeating matters there discussed.

The first point urged by plaintiff is that the court erred in permitting the reading to the jury as impeachment of witness Walter S. Orr, the questions and answers from a deposition taken at New York City in January, 1936. Plaintiff asserts that of the forty questions and answers read for the purpose of impeachment, not one was contradictory or inconsistent; that twelve were not read to the witness on his cross-examination, nor shown to him, and as to eleven such questions the witness said he would now testify the same way, and that the form of the questions constituted merely a memory test. Plaintiff declares that the method of examination followed by the defendant shows an absence of the elements which must be found in impeaching proof. These elements, plaintiff contends, are: (a) statements read as impeachment must be contradictory to and inconsistent with the testimony given in the trial; (b) such contradiction or inconsistency must be as to material matters; (c) the earlier statements must be read or shown to the witness, and (d) the witness must deny making the earlier statements. Defendant meets these contentions by the statement that plaintiff objected only to the last question read into the record as impeachment. Defendant maintains that in any event, the impeaching questions were proper, that they were in compliance with the recognized practice, that the witness was evasive, and that defendant properly brought to the attention of the jury previous contradictory statements. The purpose of impeaching a witness is to show that he is not worthy of belief. We agree with

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the plaintiff in its statement of the elements which must be found in impeaching proof. However, when a witness is asked whether he made statements different from his testimony on the trial, and the time and place and language are specified and he states he does not recollect, the other party may prove that he did make such statements. We are of the opinion that plaintiff objected in due time. It is apparent that the court understood the objections. The trial judge, after overruling the objections of plaintiff's attorney, announced that he would let the jury decide whether or not the questions were impeaching. It was the court's duty to decide, as a matter of law, as to the admissibility of such evidence. As to several questions and answers read to the witness from the deposition, defendant asked, "Do you remember that question and answer?" The witness answered that he did not recollect. This was merely a memory test. He did not deny giving any of the answers. As to some of them he replied that probably he did so answer, and as to others that he would now so answer. After a careful study of the record, we are convinced that the court was in error in permitting the reading to the jury as impeachment of witness Orr, the questions and answers from the deposition taken in January, 1936.

Plaintiff maintains that the court erred in permitting the introduction in evidence of the written contract between defendant and International Combustion Engineering Corporation, executed in June, 1927, as well as the contract preliminary thereto. Defendant asserts that plaintiff was not a party to the contract, that its interests were not affected thereby and that it was not bound by it in any way. The chief contention in this case is whether the contract of May 25, 1928 was between plaintiff and defendant, or the International Combustion Engineering Corporation and defendant. In ruling on the admissibility of evidence, the court must view the contentions of the respective parties. The two contracts are admissible as showing the background of the agreement



of May 25, 1928, and also as tending to show the motives of the parties in their subsequent conduct. The court was right in admitting these documents.

Plaintiff criticizes the ruling which permitted defendant to testify as to what his attorneys told him concerning a conference with representatives of the Government on May 25, 1928. On direct examination defendant testified about statements which he made to Hunter in New York City in June, 1928. Over objection he was permitted to relate what he told Hunter as statements made to him (Lewis) by his attorneys Ryan and Lux regarding what occurred at the conference at the Revenue Bureau in Washington on May 25, 1928, following the hotel conference of that date. Plaintiff contends that in that way defendant got into the record and before the jury what he alleged to be statements made to him by Ryan and Lux who were not witnesses in the case, nor subject to cross-examination. Hunter was an officer of plaintiff corporation. The alleged conversation with Hunter was admissible. Plaintiff also contends that the court erred in permitting defendant to testify as to what Learned said to defendant at the office of Hunter in New York. Learned was the president of the International Combustion Engineering Corporation. He was not, however, an officer of plaintiff corporation. The record does not show that he was authorized to act in behalf of plaintiff corporation. There was a close relationship between the two corporations. The International Combustion Engineering Corporation owned all of the stock of plaintiff. The conversation between defendant and Learned took place in the presence of Hunter, (who, at the time, was an officer of plaintiff). Our view is that this testimony was admissible.

Plaintiff urges that the court erred in permitting the introduction of the deposition testimony of Daly and Charest and certain exhibits in support of a contention by defendant that the tax settlement of 1928 was reopened and annulled by action of the Government in 1933 making deficiency assessments against him for several years; also that the 1932 offer in compromise was a

at the time of the trial, the  
evidence was not sufficient to  
establish the guilt of the  
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It is the duty of the jury  
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crime charged.

The defendant's attorney  
has presented evidence that  
the defendant is innocent of  
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It is the duty of the jury  
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has presented evidence that  
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It is the duty of the jury  
to weigh the evidence and  
decide whether or not the  
defendant is guilty of the  
crime charged.



reopening of the 1928 settlement as to plaintiff. A careful consideration of the respective contentions convinces us that the 1928 settlement disposed of the appeals then pending and nothing else. The claims presented by the Government subsequent to 1928 were new claims and had nothing to do with the settlement effected in 1928, which is the subject matter of the instant case. We find, as a matter of law, that there is no competent evidence that the settlement made in 1928 was disturbed. The introduction of the testimony of Daly and Charest, the testimony of Hunter on the same subject, and the various exhibits relating thereto, could serve only to confuse the jury and should not have been admitted. Plaintiff also urges that the court erred in refusing to permit plaintiff to introduce on rebuttal the deposition testimony of witness Orr and four exhibits, to show that the transaction in 1932 was not an opening up or setting aside or disturbance of the settlement in 1928 and to meet the proof in Daly and Charest depositions. We have indicated that the testimony of Daly, Charest and Hunter on this point and the exhibits thereon should not have been admitted. The court, having allowed defendant to introduce the testimony and exhibits relating to the alleged opening up of the 1928 settlement, should have permitted the plaintiff to introduce the proffered testimony in rebuttal. Plaintiff insists that the court erred in refusing to permit it to introduce the Boynton and Hayes depositions and plaintiff's exhibit No. 801 as rebuttal proof against the evidence produced by defendant. Defendant introduced a letter written by Hunter dated April 27, 1929, wherein he called attention to the agreement dated May 25, 1928, between defendant and the International Combustion Engineering Corporation, and requested defendant to pay his share in the sum of \$211,247.44. Exhibit No. 801 was a journal entry made in the record of plaintiff corporation in March, 1929, setting up this item of \$211,247.44 as a charge against defendant. It was proper rebuttal

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evidence and should have been admitted. Plaintiff argues that the court erred in sustaining objections by defendant to questions asked by plaintiff of defendant Lewis, and also in overruling objections by plaintiff to questions asked by counsel for defendant as shown on certain pages of the record. Defendant answers the criticism by saying that the plaintiff does not attempt to show by way of explanation or argument how it was injured in any way by the rulings complained of, and that plaintiff is not entitled to have the court pass on wholesale objections not supported by explanations, arguments or authorities. Plaintiff replies by asserting that the errors in these rulings are of such number and appear so frequently in the record that to present them separately with a statement of the situation bringing out the error in each case would have unduly lengthened the brief. After a careful study of the record we are satisfied that the court did unduly restrict the plaintiff in his examination of the defendant. We are also of the opinion that the court was in error in overruling the objections by plaintiff to some of the questions asked by counsel for defendant; for instance, William H. Lewis was asked whether he delivered certain checks in payment of income taxes to the Collector of Internal Revenue in reliance on an alleged agreement between defendant and plaintiff. The court overruled the objection of plaintiff and the witness answered in the negative. William H. Lewis was not conversant with the situation. Any information he had was necessarily derived from others. The question invaded the province of the jury and allowed the witness to decide the chief issue in the case. As appears from page 2026 of the record defendant as a witness was permitted to invade the province of the jury by giving his conclusion that the written agreement entered into at Washington on May 25, 1928 was with the International Combustion Engineering Corporation. On page 2027 a like error appears. As appears on page 2075 the court erroneously permitted defendant to state his construction of the agreement of May 25, 1928. Plaintiff complains about the action of the court

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in admitting defendant's exhibits Nos. 8, 30, 31, 34, 35 and 37. The court did not err in admitting exhibits Nos. 8, 30 and 31. The court should not have admitted exhibits Nos. 34, 35 and 37. As heretofore stated, the last three exhibits would serve only to confuse the jury.

Plaintiff further contends that the court should not have permitted defendant to file his "amendment to defendant's special defenses" on October 25, 1940, at the close of the trial. This is the amendment which avers that the alleged agreement pleaded in plaintiff's declaration was cancelled and rescinded by mutual consent of the parties on or about June 20, 1928. We have ruled that the testimony by defendant as to conversations in New York in June, 1928 was admissible. We find that the granting of permission to file the amendment was within the discretion of the court. Plaintiff also complains of the action of the court in striking the second count of plaintiff's amended declaration, consisting of the common counts. We are of the opinion that the court was in error in striking the common counts. We do not believe that such action affected the substantial rights of plaintiff, as the first count of the amended declaration fully presented its case. Plaintiff urges that the court erred in striking from the first count of its amended declaration the clause, "and that the said F. J. Lewis and W. H. Lewis would reimburse the plaintiff, and the plaintiff would reimburse the said F. J. Lewis and W. H. Lewis for any such additional taxes and interest thereon assessed and paid by it or them in excess of one-half of such aggregate amount". We agree with plaintiff that the court should not have stricken this clause. However, as in the striking of the common counts, this action did not harm plaintiff. The clause merely sought to state the obligation arising from the matters alleged.

Plaintiff urges that the court erred in giving instructions and in refusing to give instructions, and supports this assignment of error by argument and citation of authorities. Defendant responds



by saying that plaintiff is in no position to urge that the giving or refusal of any instruction was error because no specific objection was interposed by the plaintiff. Defendant does not discuss the instructions, or attempt to meet the argument of plaintiff, except to point out that no specific objection was interposed. The record does not show that plaintiff objected to the giving or refusal to give any instruction prior to the time when it filed a motion for a new trial. In the motion for a new trial it did present the same objections as are now presented as to the instructions. The point made by defendant was passed on by the Supreme Court in the case of Department of Public Works & Buildings v. Barton, 371 Ill. 11. Under the doctrine of that case it is unnecessary at the present time to object or except to the giving or refusal of instructions before the jury retire to consider their verdict. A litigant may object to the giving or refusal of instructions in his motion for a new trial. Having so objected, a court of review will pass on the points raised. The court refused to give plaintiff's instruction No. 1, which presents the "ratification and adoption theory" discussed in our previous opinion. We agree that plaintiff has the right to have this theory presented to the jury and that the instruction should have been given. Plaintiff also insists that the court erred in refusing to give plaintiff's instruction No. 11, which told the jury that the plaintiff was not a party to the written contract between defendant and International Combustion Engineering Corporation, relating to the sale by defendant of stock in plaintiff corporation, and that the claims asserted by plaintiff and plaintiff's right of action, if any, were not affected by the sale and the contract made between defendant and International Combustion Engineering Corporation. Plaintiff had the right to an instruction that it was not a party to the sale contract between defendant and International Combustion Engineering Corporation. The balance of the instruction, however, would tend





to confuse the jury, and the court did not err in marking it "refused". Plaintiff also contends that the court erred in giving defendant's instruction No. 1. This instruction undertakes to outline the pleaded claims of plaintiff. The instruction omits any reference to that part of the declaration setting out the written memorandum of May 25, 1928. This instruction also tells the jury that one of the defenses is that the alleged contract was rescinded by the mutual consent of the contracting parties before it was acted upon. The instruction does not indicate who the contracting parties were. It also tells the jury that the agreement mentioned in plaintiff's declaration contemplated a settlement of defendant's tax liability for certain years including 1917 to 1920, inclusive, and that such settlement was not effected pursuant to the alleged agreement, but was effected by the independent action of the defendant in the year 1934. Our discussion of this subject in another part of the opinion necessarily condemns this instruction. Instructions similar to defendant's instruction No. 4 have been criticized by our courts of review. Defendant's instruction No. 8, in referring to the written agreement of May 25, 1928, states that they are to be construed "against the party for whom or on whose behalf they are prepared, and that if ambiguous the jury is to adopt a construction more favorable to the defendant in this case." This instruction is misleading and confusing. Defendant's instruction No. 10 should not have been given. It could only serve to confuse the jury. Defendant's instruction No. 11 is confusing in that it assumes that the evidence might prove that there was an agreement entered into between defendant and Hunter. Hunter acted only as an agent for the plaintiff or International Combustion Engineering Corporation. Defendant's instruction No. 12 is on the subject of fraud. It leaves out the essential elements that constitute fraud and should not have been given. Defendant's instruction No. 13 tells the jury that express proof of fraud is not required and that fraud may be proved by circumstantial evidence as well as by positive

to compare the jury's verdict with the evidence presented to it. The jury is the trier of fact, and its verdict is the final determination of the facts in the case. The court's role is to apply the law to the facts as found by the jury. In this case, the jury found that the defendant was guilty of the crime charged. The court must accept the jury's verdict unless it is clearly erroneous. The court has reviewed the evidence and the jury's verdict, and it finds no error. Therefore, the court affirms the jury's verdict and the sentence imposed by the trial court.

proof. This is an abstract instruction and is misleading. Instructions No. 12 and 13 should not have been given for the further reason that the record does not show that there was any fraud. In view of our criticism of the attempt to impeach the witness Orr, defendant's instruction No. 14 is erroneous. Instruction No. 17 is subject to the same criticism. Defendant's instruction No. 20 is erroneous in that it ignores the ratification and adoption theory of plaintiff. Plaintiff complains that defendant's instructions Nos. 7, 26 and 27 emphasize defendant's claim that he made no contract with plaintiff, but was contracting with the International Combustion Engineering Corporation, and calls attention to cases which hold that the practice of giving an excessive number of instructions has been condemned. We agree with this criticism. Defendant's instruction No. 25 informs the jury that if they believe that after May 25, 1928, the contract was rescinded or cancelled by the consent of the contracting parties, they should find for the defendant. There was evidence of rescission consisting of the testimony of defendant as to a conversation in June, 1928, in which he repeated to Hunter and Learned what had been told to him by Ryan and Lux concerning the conferences with representatives of the Government on May 25, 1928. Plaintiff also argues that this testimony is not worthy of belief. The latter part of the objection to this instruction is in reality leveled at the character of testimony on which the instruction is based. Instruction No. 28 is bad as it leaves to the jury the construction and effect of the power of attorney. The construction of the power of attorney was for the court. Plaintiff also argues that counsel for defendant was guilty of improper and prejudicial conduct during the trial. Defendant replies by saying that as plaintiff did not object then, he cannot be heard to complain now. In this respect, we agree with defendant.

[illegible]

Finally, plaintiff insists that the verdict is contrary to the manifest weight of the evidence. Because of the errors discussed, requiring a reversal of the judgment, it is unnecessary to consider whether the verdict is manifestly against the weight of the evidence. Defendant assigns as cross-error the action of the court in sustaining plaintiff's special demurrer to defendant's plea of the Statute of Limitations to Count No. 1 of the amended declaration. This point was urged by defendant on a previous appeal and rejected as being without merit. On this subject we adhere to the views expressed in the previous opinion. Because of the errors pointed out, the judgment of the Circuit Court of Cook County is reversed and the cause remanded with directions for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL AND KILEY, JJ. CONCUR.



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JACOB L. HIRNING and WILHELMINA HIRNING,

APPELLANTS.

CONTRACTING & MATERIAL COMPANY, a corporation,  
FRANK KUFNER and CLARENCE KUFNER,

APPELLEES.

CIRCUIT COURT

Cook County.

312 T.A. 655

MR. PRESIDING JUSTICE ROBERT OLLIVER, CHIEF JUSTICE OF THE COURT.

On Sunday, October 3, 1937, between 10:30 and 11:00 A.M., Jacob L. Hirning, then 46 years of age, a teacher of psychology, was driving his Plymouth sedan automobile in an easterly direction on Diversey Parkway in Chicago. His wife, Wilhelmina Hirning, the same age as her husband, was seated alongside of him. Diversey Parkway is a highway under the jurisdiction of the Chicago Park District, and runs in an easterly and westerly direction. The road accommodates four lanes of traffic, two eastbound and two westbound. In the center of this highway are painted two parallel white stripes, which serve as division lines to indicate to the operators of vehicles approaching in opposite directions that they are not to drive to the left of such stripes. Damen Avenue and Clybourn Avenue intersect Diversey Parkway. Damen Avenue runs north and south and Clybourn Avenue runs northwest and southeast. Hoyne Avenue, a north and south street, enters Diversey Parkway from the south one short block west of the intersection of Diversey Parkway with Damen and Clybourn Avenues. Hoyne Avenue does not run north from Diversey. One block west of Hoyne Avenue, Leavitt Street, running north and south, intersects with Diversey Parkway. About half a block to the west of Leavitt Street a bridge carries traffic across the North Branch of the Chicago River. The Julia Lathrop housing project was then being completed. The buildings of this project are on both the north and south sides of Diversey Parkway. The

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asphalt pavement on Diversey Parkway was dry. The Contracting & Material Company, a corporation, had a contract to install a four duct conduit line across Diversey Parkway in connection with the lighting of the Julia Lathrop housing project. On Friday morning, October 1, 1937, the employees of this corporation excavated the north half of Diversey Parkway and installed four duct lines, during which operation all traffic was diverted to the south side of the street. The trench was then filled with a combination of refuse stone, screenings and dirt and was tamped down. The employees then excavated the south half of Diversey Parkway, diverting all the traffic to the north side of the street while the operation was in progress. The trench was then filled in the same way as the trench on the north half of the street. A space in the center of the parkway at the point where the traffic separation stripes cross, was not disturbed. All of the work of excavating and installing the conduit and the filling in and tamping down of the trench was completed by Friday afternoon, October 1, 1937. However, the excavation was not filled to the level of the contiguous pavement. Space was left so the Chicago Park District could restore the pavement by placing asphalt on top of the base laid by the Contracting Company. Mr. and Mrs. Hirning had been visiting friends on the west side and were returning to their home on the south side. Frank Kufner was the owner of a 1937 Dodge sedan automobile, which, on the night of October 3, 1937, between 10:30 and 11:00 P.M., was being driven by his son, Clarence Kufner, in a westerly direction on Diversey Parkway. Emma Kufner, the wife of Frank Kufner, was riding with her son. They had visited a funeral home and then visited with Mrs. Kufner's sister. Clarence Kufner drove the car south on Damen Avenue and west on Diversey Parkway. They were on their way to their home, at 4444 Diversey Boulevard. The headlights of both the Kufner and Hirning automobiles were lighted. While the

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17. The seventeenth

18. The eighteenth

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20. The twentieth

21. The twenty-first

22. The twenty-second

23. The twenty-third

24. The twenty-fourth

25. The twenty-fifth

26. The twenty-sixth

27. The twenty-seventh

28. The twenty-eighth

29. The twenty-ninth

30. The thirtieth

Hirning automobile was being driven in an easterly direction and the Kufner automobile in a westerly direction, there was a collision. The impact of the cars occurred on Diversey Parkway near Leavitt Street, either east or west of the depression that was made for the conduit. Following the impact of the cars, the Hirning automobile traveled in a southeasterly direction on Diversey Parkway until it was stopped by striking a tree growing in the grass plot between the curb and the sidewalk on the south side of Diversey Parkway. Mr. and Mrs. Hirning were injured and were removed to a hospital where they received medical aid. On December 29, 1937, they filed their complaint in the Circuit Court of Cook County against the Contracting & Material Company, Frank Kufner and Clarence Kufner and therein sought to recover on account of personal injuries they suffered. They charged the Kufners with being negligent in and about the operation of the automobile which Clarence Kufner was driving and the corporate defendant with negligence in the restoration of the pavement following the installation of the conduit line. The trial resulted in a verdict in favor of each plaintiff and against all of the defendants, the damages being assessed at \$5,000 for each plaintiff. Motions by the defendants for a directed verdict, for judgment notwithstanding the verdict and for a new trial were overruled. The court entered judgment on the verdict, to reverse which this appeal is prosecuted.

Plaintiffs do not state their theory of the case. We assume, therefore, that the statement by defendants as to plaintiffs' theory of the case is satisfactory to plaintiffs. Plaintiffs' theory of the case, as stated by the corporate defendant, is that at and immediately prior to the time of the happening of the accident they were riding in an easterly direction along the south side of Diversey Parkway, and that an automobile being driven by Clarence Kufner in a westerly direction came from the north side of said



street over on to the south side of the street and collided with the automobile driven by the plaintiff Jacob L. Hirning. The Kufners state that plaintiffs' theory of their case is that while they were in the exercise of due care for their own safety, their automobile ran across the excavation, as a result of which the plaintiff Jacob L. Hirning lost control of his car and it then ran into the Kufner automobile and thereafter into a tree on the south side of Diversey Parkway; that an alternative theory of plaintiffs is that the defendant Clarence Kufner negligently drove his automobile across the center line of the street causing it to strike the automobile of plaintiffs, which thereafter struck the excavation in the street and the tree; that a further alternative theory of plaintiffs is that because of the combination of the alleged negligence of the defendants, the collision occurred, and the plaintiff Jacob L. Hirning lost control of his car and it struck the tree causing the injuries to plaintiffs. The theory of the contracting company is that it was not guilty of any negligence in and about the doing of the work in question; that following the installation of said conduit, it carefully filled the excavation with refuse stone and dirt, tamped same, and that same was smooth and even, and that at the time of the accident the street at the place where the conduit had been installed was in a safe condition for persons traveling on said street; and it is further the theory of the contracting company that the accident happened on the south side of Diversey Parkway, and that the presence of the filled in excavation was not and could not have been the proximate cause of the accident complained of, and that it was not guilty of any negligence which was the proximate cause of the accident. The theory of the defendants Frank and Clarence Kufner is that they were not guilty of the negligence charged against them, but to the



contrary the automobile of plaintiffs crossed the center line of the street to the north half of the highway and struck their car, and that this action of plaintiffs' automobile resulted either from the excavation in the street or because the driver of that car did not have it under proper control.

The first criticism leveled at the judgment by the corporate defendant is that the trial court erred in refusing at the close of all the evidence to instruct the jury to find it not guilty. The second point advanced by this defendant is that the trial court erred in overruling its motion for a judgment notwithstanding the verdict. Finally, this defendant urges that the court erred in overruling its motion for a new trial. The first two points are grounded on the contention that there is no evidence in the record tending to sustain the charges of negligence made against the corporate defendant. Under this point, this defendant insists that the evidence conclusively shows that the collision between the automobile in which the plaintiffs were riding and the automobile of the individual defendants occurred on the south side of Diversey Parkway, and that the excavation which had been filled in was not the proximate cause of the accident and the injuries complained of. This defendant also maintains that there is no evidence in the record fairly tending to show that the condition of the street at the place in question following the installation of the conduit was the proximate cause of the accident and injuries complained of. The sole point urged by the individual defendants, Frank and Clarence Kufner, is that the judgment as to them is against the manifest weight of the evidence, and ask that we reverse the judgment and order a new trial. The corporate defendant asserts that the judgment is manifestly against the weight of the evidence and that the court erred in not allowing its motion for a new trial. Because of these contentions we summarize the evidence.





Walter E. Mielly, called by plaintiffs, testified that at the time of the occurrence he was superintendent of construction for the Contracting & Material Company, which position he had held for fifteen years; that all the work, including the excavating and installation of the conduit, was finished on Friday, October 1, 1937, at about 4:00 P.M.; that the trench was filled with refuse stone, screenings and dirt; that it was then tamped down and opened up to traffic, and that the ditch was full and tamped evenly all along. He further testified that under its contract the contracting company was not to do the asphalt resurfacing; that this company was to maintain the part of the street where the work had been done in a reasonably safe condition until such part was resurfaced; that he saw the ditch on Saturday, October 2nd and again on Monday morning, October 4th, and that on both of these mornings the street where the excavation had been made was in the same condition as it was on Friday after it had been tamped down. Jacob L. Wirning testified in his own behalf and stated that he was driving his Plymouth automobile in an easterly direction at a speed of 20 to 25 miles an hour; that his car was on the south side of Diversey Parkway, the part of the road used for eastbound traffic; that the left hand side of his car was about four feet south of the center line as he was driving eastwardly; that he noticed there were some cars coming west on the north side of the parkway; that one car slowed down; that as this car slowed down another car came from behind and came over to the south side of the street; that it seemed the latter car would come directly on to his car; that in order to avoid a head on collision he turned his car as quickly as he could to the right, which would be to the south side of the street; that by that time the car which passed the car which had slowed down struck his car; that he felt some bumps, lost control of his car, and became unconscious; that his car hit a tree on the south side of the curb; that this tree was



about forty or fifty feet from where the two cars came together; that when he first saw the automobile which came over onto the south side of the street he would say it was from twenty to forty feet from him; that his automobile was on the south side of Diversey Parkway and the automobile which collided with him was also on the south side of Diversey; and that prior to the time of the collision he did not see any ditch in the street. On cross-examination he testified that in a deposition given before the trial he said that after the collision with the other car he lost complete control of his car and before he could stop or do anything, the car hit a tree on the right side of the street; that he was about four feet to the right of the center line, and then as he began to turn, the other car struck him; that he never saw the place where the work had been done on the street; that when he first noticed the other car turning out past the car ahead of him the lights were burning and it was impossible to judge exactly how far in feet it was away from him; that the car which hit him swung out to the south of the head car going west; that the head car slowed down; that the traffic seemed to be like fair, average traffic moving in both directions; that as he got close to the point of the occurrence he saw the first of the westbound cars slow down, but that he did not at any time he was passing that car or approaching it see it come to a stop; that he did not pass it before the collision, and that the collision occurred out in front of that car.

Wilhelmina Hirning, testifying in her own behalf, stated that she was seated in the front seat of their automobile beside her husband; that she was looking ahead; that she did not see any traffic going east right in front of their car just before the accident, but saw some traffic going west; that she could not tell



how many automobiles she saw and that when their automobile came to the bridge they saw some cars coming; that she looked over to her husband and watched him; that he turned to the right and the cars came toward them; that after a few minutes there was a collision; that she felt a bump and then she was gone; that their automobile was on the right side of the street. On cross-examination by counsel for defendants, the Kufners, Mrs. Kirning said she could not tell that she felt the bump when the car hit the tree; that she felt the collision first and that was before she felt the car go over some bumps in the street; that she was sure about that. She stated that in giving her deposition prior to the trial she was asked if she felt a bump as they approached the place of the occurrence; that she answered "Yes" and that the bump was just before the collision; that she supposed she must have answered those questions in that fashion but that she was quite sure she was confused. Mrs. Herman Engelhardt, called by plaintiffs, testified that she lived at 2239 Diversey Parkway, about a block west of the intersection of that highway with Clybourn and Damen Avenues; that on the night of the accident at about 11 o'clock she and her husband were walking east on the north side of Diversey; that the night was fair and the street dry; that she had passed by that particular place before that night and on the day before; that with reference to the place where the excavation had been made for the conduit, she said it was located in about the 2100 block on Diversey, east of the bridge, and extended north and south across Diversey; that it was about two feet wide, and on the south half of the roadway was from four to six inches deep; that there were street lights on either side of Diversey immediately opposite that place; that there were no red lights about it; that she saw the eastbound automobile north and directly opposite the ditch; that there were automobiles going west; that the first



automobile going west stopped at the ditch, and the second automobile turned to pass the first car going west; that it turned a little to the left; that she didn't see the eastbound car until it was at the ditch; that the eastbound car hit the ditch and swerved into the second car going west and then turned southeast into a tree; that the front left-hand fender of the car going west and the front left hand fender of the car going east came together; that after the collision occurred she remained until the police arrived; that she didn't go across the street to the accident; that following the collision she did not go over to the automobiles; that the eastbound automobile struck a tree on the south side of Diversey head on and stopped; that this was east of the ditch; that the westbound automobile was not moving after the accident; that it was on the same side of the street; that the driver of the westbound car turned his car around and went over to the scene of the accident, making a "U" turn. On cross-examination by counsel for the defendants Kufner, she testified that the accident happened in front of her in the street; that a car came up and stopped on the east side of the ditch; that there was a car a little distance back of it following along; that as the first car stopped the other started to pull out from behind it; that the second car going west had just started to come around the first car when the collision occurred; that the second car which turned out was on its own side of the center line of the street at the time of the collision which she said occurred ten or twelve feet east of the ditch. On cross-examination by counsel for the contracting company, this witness was shown plaintiffs' exhibit No. 4, being a photograph taken by a policeman a few minutes after the occurrence, and she testified that she recognized on the photograph what she referred to as a ditch. The photograph shows a white strip running across Diversey Parkway, except at the point where the center of the roadway intersects. She further





testified that in a previous trial of the case the letters A, B and C were placed on the photograph in her handwriting; that her memory was as good at the time of the previous trial as at the time of the current trial; and that at that time she marked the point where the car from the west and the car from the east collided by the letter "A". Upon further cross-examination by counsel for the defendants Kufner, she testified that at the time she put the letter "A" on the photograph she was confused. Then on further cross-examination by counsel for the contracting company the witness said that upon the previous trial she was shown the picture and that counsel asked her to mark with a letter "A" on the picture where the two automobiles came together; and she testified on this trial, "I remember that I finally said it was in about - I will mark this 'A' for the one going east." She further testified that upon the previous trial she had marked the letter "B" where the first westbound car was at the time the other two cars came in contact with each other. She also said she was asked to indicate about the point at which the second car started to turn out to pass the first car with the letter "C", and that she marked the photograph as she remembered. On re-direct examination of counsel for plaintiffs, she said the first car going west slowed down; that it did not stop entirely; that it slowed down when the second automobile started to pass it; that the wheels of the second automobile just turned and it started to pass right alongside; that when the collision occurred between the eastbound automobile and the second westbound automobile, about half of the second westbound automobile was alongside of the first westbound automobile.

Joseph Nichol, called by plaintiffs, testified that he was a police officer of the City of Chicago, assigned to the Accident Prevention Bureau; that while in the vicinity of Clark Street and Fullerton Avenue they received a radio call reporting the accident; that they arrived at the scene of the accident about five minutes



after the call; that he took a photograph showing the surface of the street, including the place where the conduit had been installed, and also photographs of the two automobiles involved in the accident. This photograph was admitted as plaintiffs' exhibit No. 4. The photograph was taken by a camera located at the southeast corner of Leavitt and Diversey, which is west of the scene of the accident. The photograph shows the white traffic line along the center of Diversey and the white strip across Diversey. The witness testified that the photograph showed just how the street looked. The photograph shows a skid mark across the north and south strip where it intersects the white line running east and west on Diversey. The white strip represents what is referred to as the "excavation", the "depression" and the "ditch". Officer Nichol further testified that the surface of the street where it had been torn up was about eighteen inches wide; that it had been torn up all the way across except the center; that the white strip shown on the photograph, running north and south, is what he referred to as being where the street had been torn up; that he observed the skid mark shown in the photograph as letter "B" in the photograph. He further testified that so far as there being any ditch or hole there, it was practically level with the rest of the street, with the exception of an inch or an inch and a half dip down; that it would be lower in the middle where the automobiles ran over it; that the pavement on Diversey is asphalt; that it is not a smooth hard surface; that it was in good condition outside of that place that had been torn up, but was somewhat wavy, a little wavy all along the street as asphalt usually is; that there were street lights all along Diversey, about fifty feet apart, maintained by the Chicago Park District, and that the street was well lighted. Clarence Welsh, called by plaintiffs, testified that he was a police officer employed by the Chicago Park District;



that in response to a radio call to make an investigation, he went to the scene of the accident; that when he arrived there he made an examination of the street and its condition; that plaintiffs' exhibit No. 4, a photograph, represented the conditions as they existed at the time he made such investigation; that he saw the white strip running across from the north to the south; that it had been an opening for a conduit; that the white that appears there is a strip of concrete they put in on top of the dirt and left a little opening to put asphalt on top of the concrete; that the opening was two feet wide and came within six feet of the center line; that was not open; that it had also not been opened clear to the curb; that it had been filled with concrete or stone and was a smooth road outside of an inch or an inch and a half drop into the two feet opening they had made across the street; that it extended the same way across the street; that there was no opening in the middle of the street; that there was no big hole; that there was an inch or an inch and a half drop; that he was on duty that day and patrolled the street and had passed the place several times, going both east and west; that it was the same all day. Plaintiff called Clarence Kufner under Section 60 of the Civil Practice Act. He testified that as he drove west on Diversey Parkway there were two cars immediately in front of him; that the car immediately in front of him was about thirty feet ahead of him; that prior to the time anything happened he did not see a ditch or trench in the street; that he glanced at the surface of the roadway occasionally as he was driving along. On cross-examination by counsel for the contracting company, he testified that earlier in the evening he had driven past the place where the accident occurred; that he never noticed the excavation along Diversey until the accident happened when he was on his way home, that is with reference to the north side of the street, but he said he had seen the excavation on the

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south side of the street before the accident. He also admitted that upon the previous trial he had been asked if he saw this trench at any time before anything unusual occurred, and he answered he did not. He further testified that after the accident he made a "U" turn in the street and ended up heading east; that he had seen the ditch on the south side of the street before that time, and that he saw it earlier the evening of the accident. He further testified that earlier in the evening when he had driven east on Diversey it was dark; that there was a kind of white mark in the street where the ditch was located; that he noticed it when he got right near to it and went over it; that it was the first time he saw it. He also stated that at the time of the accident traffic was medium, maybe one or two cars every fifteen or twenty feet. The defendants Kufner put on three witnesses, namely, Herman Engelhardt, Mrs. Emma Kufner and Clarence Kufner. Mr. Engelhardt testified that at the time of the accident he and his wife were walking east on Diversey Parkway; that he saw two cars going west on Diversey; that the first car stopped; that there was a ditch across the street at or near where that car stopped; that the second car going west was about forty feet behind the first car, and when about ten feet behind this car he turned to the left toward the center; that he then saw the car going east strike the ditch and glance over to the middle lane; that the car going east after it passed the ditch went over about eight feet and side-glanced off the second car going west. Mrs. Emma Kufner testified that before the accident they were driving west on Diversey; that they were on the north half of the center line; that there was an automobile ahead of them which had stopped very short, and that they stopped real short in order to avoid hitting that car; that they came to a perfect standstill as did the car ahead of them; that another car going east as it passed them all of a sudden hooked in their





back bumper with the fender; that they were on the north side of the street, and when the eastbound car hooked their bumper it flew off like an aeroplane to the east. Clarence Kufner, called as a witness on his own behalf, testified that when the car ahead of him, which, he said, had no tail lights, stopped, he swerved to the left but in hitting the other car he (witness) stopped. Witness said he applied the brakes at the time he swerved over to the left; that he noticed a car coming directly east driving close to the center white line of the street; that this car did not change direction until he hit the bump in the street; that he saw the car jump up and down, and after that it collided with his front fender and swerved south until it hit a tree and stopped. He further testified that at the time of the collision his car was about a foot or a foot and a half north of the white line in the center of the street; that the car in front of him stopped in front of a hole. He did not testify as to the depth, nature or character of the hole. Both witnesses sustained injuries. The principal injuries sustained by the plaintiff, Jacob L. Hirning, were a fracture of the right patella and some bruises on various parts of the body. Dr. Charles Pease, who was his physician, operated and sutured the broken fragments together. Plaintiff, who was a professor in the Y.M.C.A, returned to his regular work within six weeks and has been working continuously ever since. Plaintiff, Wilhelmina Hirning, sustained fractures of several ribs, a fracture of the nose, a dislocation of the elbow and a fracture of the malleoli of the left ankle. The damages awarded by the jury were not unreasonable and the defendants do not make any point that such damages are excessive.

Plaintiffs meet the argument of defendants by asserting that whether the condition of the street was the proximate cause of the injuries complained of was a question of fact for the jury;

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that no errors were committed in the trial and that the verdicts are not against the manifest weight of the evidence. From a summary of the evidence, it is manifest that there is a sharp conflict as to where and how the collision occurred. We are convinced that there is competent evidence in the record to show that the collision between the two automobiles occurred on the south side of Diversey Parkway. We also find that there is competent evidence in the record which would justify the jury in finding that Clarence Kufner was guilty of negligence in driving his car to the south of the center line. The testimony clearly shows that the plaintiffs were in the exercise of due care for their own safety. The corporate defendant argues that the evidence shows that there was a drop of not more than an inch or an inch and a half along the space where the excavation had been made, and points out that there was a steady flow of traffic over the street from Friday evening, after the excavation was filled, tamped and the street opened to normal traffic, until the time of the occurrence on Sunday evening; and that it does not appear that any other automobile was in any accident or difficulty in passing over such place. This defendant is correct in the statement that there was a steady flow of traffic from Friday evening until Sunday evening, and that there was no evidence of an accident to any other automobile or that any other automobile had difficulty in passing over the place where the conduit was installed. Counsel also states that it is common knowledge that on every street around the city of Chicago or anywhere one can scarcely drive a mile without passing over a space where there may be a depression of an inch or an inch and a half or more, and that the duty imposed upon the corporate defendant was to see that the street was in a reasonably safe condition for traveling. We agree with this statement as to the duty of the corporate defendant. While it is true that two of the witnesses testified that the depression



was one to one and a half inches deep, one of the witnesses, Mrs. Engelhardt, testified that on the south half of the roadway the depression was from four to six inches deep. The contracting company points out that this witness did not leave the sidewalk on the north side of the street and that she would not have a good view of the depression. However, she lived in the vicinity and testified that she walked by that place on the night of the accident previous to the time when she witnessed the accident, and that she also passed there on the day before. It was for the jury to say what credence should be given to her testimony. The evidence shows that following the collision between the two cars, plaintiffs traveled in a southeasterly direction and ran into a tree. Most of the damage to this car and all of the injuries suffered by plaintiffs took place when their car collided with the tree. We are of the opinion that there is competent evidence in the record from which the jury had a right to find that the injuries suffered were caused by the negligence of Clarence Kufner in suddenly driving his car to the left of the center line, and of the corporate defendant in the installation of the conduit line. This case presented purely a question of fact for the jury. The court was right in overruling the motions for a directed verdict and for a judgment notwithstanding the verdict. We also take the view that the judgment is not contrary to the manifest weight of the evidence and that the court did not err in overruling the motions for a new trial. Therefore, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND KILEY, JJ. CONCUR.



41768

BERNICE GROSSMAN,

Appellee,

v.

HERMAN GROSSMAN,

Appellant.

COOK COUNTY.

312 L.A. 655

MR. PRESIDING JUSTICE BURKE DELIVERED THE VERDICT OF THE COURT.

On October 7, 1939, Bernice Grossman filed her complaint for separate maintenance in the Superior Court of Cook County. She represented that on July 28, 1938, she married Herman Grossman, defendant; that they lived and cohabited as husband and wife until March 3, 1939, when defendant, without any provocation or justification abandoned the home; that despite her repeated requests he refused to return and resume marital relations; that on the last mentioned date he wrongfully deserted and abandoned plaintiff without any reason, just cause or provocation; that from that day plaintiff lived apart from defendant without any fault on her part; that "at the time of her marriage plaintiff was possessed of a sum in excess of \$8,000, and that she advanced moneys in excess of \$8,000 to the defendant for the purpose of engaging in business; that said sum represented her entire assets, and was advanced to the defendant at various times and in various amounts from July 28, 1938 to March 3, 1939; that at the time of such advances defendant had agreed to repay such advances, and that plaintiff would share in the proceeds of the business or businesses to be engaged in by the defendant, or in any enterprises in which the defendant would be engaged; that the defendant has failed and refused to account to the plaintiff for any proceeds so derived, and has refused to divulge to her the nature of the business and the use made of the funds advanced by the plaintiff, and has refused to pay back to the plaintiff any of the funds advanced by her; that plaintiff is informed and believes that the defendant has in his possession and

The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, for the years 1940 through 1949, inclusive, regarding the acquisition of land for the proposed project. The information is presented in the following table:

| Year | Acres Acquired | Source of Acquisition |
|------|----------------|-----------------------|
| 1940 | 1,200          | Private Purchase      |
| 1941 | 1,500          | Private Purchase      |
| 1942 | 1,800          | Private Purchase      |
| 1943 | 2,100          | Private Purchase      |
| 1944 | 2,400          | Private Purchase      |
| 1945 | 2,700          | Private Purchase      |
| 1946 | 3,000          | Private Purchase      |
| 1947 | 3,300          | Private Purchase      |
| 1948 | 3,600          | Private Purchase      |
| 1949 | 3,900          | Private Purchase      |

The total amount of land acquired for the proposed project during the period 1940 through 1949, inclusive, was 39,000 acres. The acquisition of this land was accomplished through the purchase of private land from the owners thereof.



control, most of the moneys advanced to him, and that L. B. Harris and L. B. Harris & Company, a corporation, are indebted to the defendant, or are holding for his use and benefit, certain goods, chattels and other personal property arising out of the use made by defendant of the funds advanced by plaintiff; that certain other personal property is kept by the defendant in a safety box at the American Trust and Safe Deposit Company, and that the defendant has funds on deposit with the Personal Loan & Savings Bank, a corporation in Chicago, Illinois, and Harris Trust & Savings Bank, a banking corporation; that plaintiff has no other assets or property other than the funds advanced to the defendant, and that although plaintiff is gainfully employed, she is partially dependent upon the funds belonging to her, and advanced by her to the defendant." On October 9, 1939 and October 20, 1939, orders for temporary injunctions were entered, restraining the parties named therein from making any payments, or delivering to defendant any property in their charge, custody or control, belonging to defendant, or from giving him access to any safety deposit box, and further restraining him from selling, mortgaging or otherwise disposing of any and all property belonging to him, or having any access to any safety deposit box standing in his name or to which he had right of entry, until the further order of the court. On November 16, 1939, defendant moved to dismiss the complaint. This motion has not been passed upon. The defendant moved to dissolve the injunctions. The Chancellor did not pass on such motion, whereupon defendant prosecuted an appeal to this court. In an opinion filed on April 10, 1940, and reported in 304 Ill. App. 507, we affirmed the two injunctive orders. After our mandate was filed, the defendant moved to vacate the injunctive orders. In an opinion filed on November 20, 1940, and reported in 307 Ill. App. 246, (abstract) we dismissed the appeal. On April 19, 1940, pursuant to leave granted, plaintiff filed her amended and supplemental complaint. The first five paragraphs seek to lay a



basis for a prayer for divorce on the ground of willful desertion for the space of one year and upwards, commencing March 3, 1939. The remaining allegations of the amended and supplemental complaint were the same as in the one filed on October 7, 1939. On May 3, 1940, defendant filed his motion to dismiss the amended and supplemental complaint. On January 31, 1941, the Chancellor sustained that part of defendant's motion which attacked the allegations on which the prayer for divorce was predicated, being paragraphs 1 to 5 of such amended and supplemental complaint. The reason such portion of the amended and supplemental complaint was dismissed, was that with the elimination of the period during which the separate maintenance complaint was pending, the amended and supplemental complaint showed on its face that the alleged desertion did not continue for a period of at least one year. The Chancellor, however, declined to dismiss the amended and supplemental complaint as to the remainder of the relief sought. Thereupon, defendant elected to stand upon and abide by his motion and the court decreed that "the defendant render an account to the plaintiff for any profits, earnings and moneys arising out of the use of the sum of \$8,000, charged to have been loaned to defendant by the plaintiff". This appeal followed. Plaintiff moved to dismiss the appeal, contending that the decree is not a final decree. Defendant filed counter-suggestions in which he maintains that it is a final decree. We reserved ruling on the motion. We are of the opinion that by the record made, there is a final decree from which defendant has a right to appeal. Hence the motion to dismiss the appeal is denied.

By electing to stand on his motion to dismiss, defendant admits that plaintiff advanced to him an amount in excess of \$8,000 "for the purpose of engaging in business; that said sum represented her entire assets and was advanced to defendant at various times and in various amounts from July 28, 1938 to March 3, 1939; that at the time of such advances defendant agreed to repay



such advances, and that plaintiff would share in the proceeds of the business or businesses to be engaged in by the defendant, or in any enterprises in which the defendant would be engaged; that the defendant has failed and refused to account to the plaintiff for any proceeds so <sup>derived</sup>, and has refused to divulge to her the nature of the business and the use made of the funds advanced by plaintiff, and has refused to pay back to the plaintiff any of the funds so advanced by her; \* \* \* that defendant at the time of his marriage to the plaintiff, possessed no assets of any value, other than his personal clothing and effects, and that any and all property of whatever kind or description now held for or by the defendant, or in which he is interested, or in which he has any right, title or interest, is represented by either moneys obtained from the plaintiff, or the use made of the moneys obtained from the plaintiff." From this admission it becomes obvious that the rights of the parties are settled and that all that remains is to have an accounting.

The first point advanced by defendant is that the trial court erred in granting leave to file the amended and supplemental complaint while his petition for rehearing remained undisposed of in this court. It appears that plaintiff was granted leave to file her amended and supplemental complaint after our opinion was filed but before a petition for rehearing was disposed of by this court. Defendant states that the trial court granted a supersedeas. There is no provision for a supersedeas in the case of an appeal from an interlocutory order. Such appeals are governed by Section 78 of the Civil Practice Act, (Par. 202, Chap. 110, Ill. Rev. Stat. 1941), and the Rules of the Supreme and Appellate Courts. The bond to be given in such an appeal is a cost bond. Section 78 provides that "the force and effect of such interlocutory order or decree and the proceedings in the court below shall not be stayed during the pendency of such appeal, except upon order of the Appellate Court or a judge thereof in vacation." Clearly, it was within the discretion of the



trial court to allow the plaintiff to file her amended and supplemental complaint while the appeal from the interlocutory orders was pending here.

Defendant challenges the legal sufficiency of the amended and supplemental complaint. He contends that at most plaintiff states an action in assumpsit. In view of the admissions of defendant, there would be nothing for a jury to pass upon. Defendant suggests that we reverse the decree, or in the alternative direct that the cause be remanded with directions that it be transferred to the law side of the court. In our previous opinion (Grossman v. Grossman, 304 Ill. App. 507, 515) we said: "It cannot be doubted that plaintiff has a right to an accounting from defendant for the sum of more than \$8,000 which she alleges she advanced to him." At the time defendant filed his motion to dismiss the amended and supplemental complaint he was aware of our view that under the allegations of the original complaint, (which were repeated in the amended and supplemental complaint) plaintiff was entitled to maintain an action. Par. 1 of Section 64 of the Civil Practice Act, (Par. 182, Chap. 110, Ill. Rev. Stat. 1941), provides that a defendant desirous of a trial by jury shall make his demand for a jury in writing and file the same at the time of filing appearance, otherwise such party shall be deemed to have waived a jury. As these proceedings occurred prior to the amendment of Section 64, effective July 21, 1941, they are unaffected by such amendment. Defendant by his motion, admitted the truth of the allegations of fact in the amended and supplemental complaint. He did not, at that time or at any other time demand and pay the requisite fee for a trial by jury. In view of the admissions by the defendant there would be nothing for a jury to pass upon. In addition to an accounting, plaintiff seeks discovery as to what defendant did with





the \$8,000 entrusted to his keeping. The defendant, having admitted he received the \$8,000, is in no position to refuse to account to his wife. In the marriage relationship one spouse naturally reposes trust and confidence in the other.

We are of the opinion that the Chancellor was right in denying defendant's motion to dismiss that part of the amended and supplemental complaint relating to an accounting and an injunction, and in directing the defendant to render an accounting to the plaintiff. Therefore, the decree of the Superior Court of Cook County is affirmed.

DECREE AFFIRMED.

HEBEL AND KILBY, JJ. CONCUR.

The 1930s saw a period of relative stability in the world, but the economic crisis of the 1930s led to a period of political instability. The rise of totalitarianism in Europe and the outbreak of World War II in 1939 marked the beginning of a new era of global conflict. The war led to the destruction of millions of lives and the reshaping of the world map. The post-war period saw the emergence of the Cold War, a period of tension between the United States and the Soviet Union. The Cold War ended in 1991 with the collapse of the Soviet Union. The world has since entered a period of relative stability, but the challenges of the 21st century, such as climate change and global inequality, remain.

The world is a complex and ever-changing place, and it is important to stay informed about the events that shape it.

41710

FRANK BROONI,

Appellant,

CHICAGO TITLE AND TRUST COMPANY,  
a corporation, as trustee, etc.,  
et al.,

Appellees.

APPEAL FROM

TRUST COURT

Cook County.

3121A.006

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

It appears from the statement in the action before this court that this is an appeal from an order dismissing a complaint praying for the foreclosure of a trust deed upon certain real estate. The order appealed from was entered upon the motion of one of the defendants, Fred Kemper. The motion was determined by the trial court on the complaint, defendants' motion to dismiss, and plaintiff's counter-affidavit thereto. The plaintiff-appellant contends that on the pleadings the motion to dismiss should not have been allowed.

The complaint filed by plaintiff alleges that on August 25th, 1928, Cyrus G. Olson and Ethel D. Olson executed their trust deed to secure the payment of certain bonds in the aggregate sum of \$70,000; that plaintiff is the legal holder of certain interest coupons secured by this trust deed which matured on March 25, 1929, and were extended to February 25, 1931; that no part of these interest coupons have been paid and that default in their payment has been made. The complaint further alleges that by an endorsement appearing on the interest coupons the lien thereof was subordinated to the payment of the bonds issued under the trust deed and the remaining interest coupons; that the lien of the trust deed as security for all of the bonds and interest coupons, other than those owned by the plaintiff has been extinguished and that the lien of the interest coupons held by the plaintiff is a first lien on the premises; that the defendants, Harry Cohen and Fred Kemper, have some interest in

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the premises which is alleged to be subordinate to that of the plaintiff; and concludes with the usual prayer for a foreclosure.

The defendant, Fred Kemper, filed a motion to dismiss alleging that the complaint failed to set forth a cause of action and that plaintiff had an adequate remedy at law. The motion further alleged that the trust deed described in the complaint had been foreclosed upon in a proceeding filed on March 31, 1931, by the Chicago Title and Trust Company, as trustee, relating to the same trust deed and the same property; that a decree of foreclosure was entered in that case on April 22nd, 1934, which found that the plaintiff's interest coupons had been subordinated, and awarded the Chicago Title and Trust Company for the use of the holders of the coupons a subordinated lien for the amount of the coupons. The motion to dismiss alleges that a sale pursuant to this decree of foreclosure was held on October 26, 1936, was duly approved and a Master's Certificate issued; that the rights of the plaintiff as holder of the subordinated interest coupons had been adjudicated by the decree and that the sale extinguished the lien of the coupons upon the premises, and that the complaint is without equity.

A counter-affidavit to the motion to dismiss was filed in behalf of the plaintiff which sets forth that the prior foreclosure proceeding is not res adjudicata of the plaintiff's rights; that within twelve months from the foreclosure sale the defendant effected a redemption therefrom; that the holder of the subordinated coupons was not personally served with summons in the original case and filed no answer or cross-complaint; that by reason of the subordination the interest coupons occupied the status of a junior encumbrance and the court in the prior case had authority only to decree that the interest coupons were subordinate to the lien of the unsubordinated bonds; that the decree was unauthorized and void in so far as it attempted to direct a foreclosure for the interest coupons and that the redemption from the foreclosure sale reinstated the lien of the



interest coupons and entitled the plaintiff to maintain his action thereon.

On these pleadings the court allowed the defendants' motion to dismiss, and dismissed the complaint for want of equity. It is to reverse this order - as already indicated - that this appeal has been perfected.

The facts as they appear are that on August 26, 1928, Cyrus B. Olson and his wife executed 142 mortgage bonds aggregating \$70,000, and to secure this obligation executed a trust deed on certain real estate. Interest coupon No. 1 representing the first accrual of interest on each of these bonds became due on February 25, 1931. By an endorsement placed upon each of these coupons the lien thereof was subordinated to the payment of the balance of the bond issue. These coupons were not paid when due on their extended date of maturity and have since remained in default.

On March 21, 1931, the Chicago Title and Trust Company, as successor trustee under the trust deed, filed its complaint to foreclose, default having also been made in the payment of the balance of the indebtedness. In this proceeding a decree was entered on April 22, 1934, which directed a foreclosure sale and found that interest coupons, series No. 1, had been subordinated and that they were entitled to a second lien on the premises. A foreclosure sale was held under this decree on October 25, 1938, which was duly approved and a Master's Certificate issued. Within twelve months from the date of this sale the defendant, Fred Kemper, as the holder of a second mortgage on the premises redeemed; whereupon, plaintiff filed his complaint to foreclose the subordinated interest coupons owned by him.

At the outset, appellant states that he wishes to correct a misstatement made in his counter-affidavit; that it was there stated that the redemption was made by the owner of the equity, but that it

known.

has been verified.

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appears that the redemption was, in fact, made by the holder of a junior mortgage. It is urged, however, that this difference has no effect on the decision of this case, for a junior mortgagee, when redeeming within twelve months of the sale, under sec. 18 of the Judgments Act (Ill. Rev. Stat. 1939, Ch. 77, sec. 18) does so as a grantee of the mortgagor and it is by and through the mortgagor that the statute gives such an encumbrancer a right to redeem. The case of Morse v. Smith, 83 Ill. 396, is cited, wherein the court said;

"By redeeming from that sale, complainant simply exercised a right granted to her by the mortgage made to her by Morse (the mortgagor). That mortgage placed her in the shoes of Morse as to his right to redeem from the Simpson mortgage."

Appellant cites further in support of this contention the case of Seligman v. Laubheimer, 58 Ill. 124.

It is suggested by appellee that appellant's statement of the case is deficient in that it fails to state that the pleadings show that the decree in the mortgage foreclosure case directed that the property be sold - pursuant to which decree the property was sold - for the satisfaction of the subordinated coupons held by appellant as well as for the unsubordinated bonds and coupons.

The appellant (being the plaintiff in this action to foreclose the subordinated interest coupons) made the statement "we are not attacking the original decree". However, appellant does attempt to attack the foreclosure decree. From an examination of the questions involved it appears that the decree of foreclosure determined that the trustee was entitled as the representative of the holders of the subordinated coupons to recover the amount due on those coupons, and was further entitled to have the property sold to satisfy that debt and so directed. In appellant's brief it is urged that the foreclosure decree could not direct such a sale because appellant had not filed any answer and had been defaulted. The foreclosure decree not only could but did foreclose the lien of the subordinated coupons, and that decree stands in full force and effect. If



appellant desired to contest the trustee's right to foreclose the lien of the trust deed as security for his coupons, such a defense of necessity should have been raised in the trustee's foreclosure proceeding. It is apparent that such proceedings were had in the trustee's foreclosure that the questions there passed upon by the court are res adjudicata of plaintiff's rights. The fact that there was a redemption does not avoid this conclusion, and plaintiff's alleged rights in the present action were adjudicated in the first foreclosure proceeding, and therefore, binding upon plaintiff as to his right to litigate the questions involved in the instant case.

From an examination of the facts as stated in the record, it appears that the foreclosure decree found that there was due the trustee for the use and benefit of the holders and owners of the subordinated interest coupons the sum of \$2,822.75, said decree providing as follows:

**"Second: (Subordinated Coupons)**

|   |          |
|---|----------|
| Interest coupons series No. 1, due Feb. 25, |          |
| 1929 . . . . .                              | 2,100.00 |
| Interest thereon at 7% per annum from       |          |
| Feb. 25, 1929, to Jan. 25, 1934, date       |          |
| of the Master's report . . . . .            | 722.75   |
| Total . . . . .                             | 2,822.75 |

**"First**

|                                      |             |
|--------------------------------------|-------------|
| Principal bonds and coupons not      |             |
| subordinated . . . . .               | \$83,255.55 |
| Subordinated interest coupons series |             |
| No. 1. . . . .                       | 2,822.75    |
| Grand Total . . . . .                | \$86,078.30 |

for which aggregate sum of Eighty Six Thousand Seventy-eight Dollars Thirty Cents (\$86,078.30) the complainant, Chicago Title and Trust Company, a corporation, as successor-trustee, for the use and benefit of all of the owners and holders of principal bonds and interest coupons secured by the trust deed herein being foreclosed, has good, valid and subsisting liens in the order of priority set forth in this paragraph, to-wit: First: \$83,255.55, and Second: \$2,822.75 (sub-ordinated interest coupons of series No. 1), upon the real estate and premises herein and in the Master's report described, . . ."



Pursuant to this decree, a sale was had on October 25, 1938, and this sale was approved by the Superior Court, and Master's Certificate duly issued and recorded as provided by law. The rights, claims and interest of the plaintiff which are predicated upon the said subordinated interest coupons - which are the basis of this suit - were duly, properly and adequately provided for and adjudicated by the said decree of foreclosure and sale rendered in the trustee's original foreclosure. The lien of the subordinated interest coupons was established and adjudicated by the said decree, in the paragraph above quoted, and the sale made pursuant to said decree was made for the benefit of the lien of said subordinated interest coupons, as well as all other liens established in and by said decree. It would appear that the questions involved in the instant so-called "subordinated interest coupon foreclosure" were adjudicated and passed upon by the court in the first foreclosure by the Chicago Title and Trust Company, as successor-trustee. The effect of the sale is clearly established by what was said in the case of Ogle v. Koerner, 140 Ill. 170, which was called to our attention by defendant. In that case, a decree had been entered foreclosing the lien of a senior mortgage, a sale was held pursuant to that decree, and after distribution of the sale proceeds there remained a deficiency due on the first mortgage indebtedness. Within twelve months a junior incumbrancer redeemed from the sale, and the court held that this redemption did not operate to reinstate the senior mortgage lien, which was finally and completely discharged by the sale held pursuant to the foreclosure decree. The court said:

"A mortgage, or as in this case, a deed of trust in the nature of a mortgage, vests in the party secured a lien upon the mortgaged premises. By virtue of that lien the mortgagee is entitled to have the mortgaged property sold under a decree of foreclosure and the proceeds of the sale applied to the payment of the debt secured. This is the mode provided by law for the enforcement of the lien, and when the lien has been once enforced by the sale of the property, it has, as to such property, expended its force and accomplished its purpose, and the property is no longer subject to it."



The plaintiff was represented in the trustee's foreclosure suit, the trustee representing all the parties having any interest in the foreclosure suit. As was held in the cited case of Heinroth v. Frost, 250 Ill. 102, "the sale of land under a decree of foreclosure is a sale of every interest in the land belonging to any party to the suit and discharges the land from every lien of such party". To the same effect is the case of Spain v. Smith, 373 Ill. 50, where it was said by the court;

"When the lien of the mortgage had been foreclosed and a sale had, the mortgage had expended its force and the property was no longer subject to its provisions."

Following these authorities, it is apparent that the decree entered in the trustee's foreclosure foreclosed the lien of the trust deed as security for the subordinated coupons.

When we consider the facts as brought to our attention it appears that plaintiff in this action took no steps to question the decree of foreclosure and sale in the trustee's foreclosure. This foreclosure decree found the indebtedness due on the subordinated interest coupons to be due to the mortgage trustee for the use of the holders and owners of said coupons (plaintiff), and directed a sale to satisfy that indebtedness. The sale held pursuant thereto discharged the lien of the trust deed, as security for the subordinated interest coupons, upon the property.

From an examination of the record as appears before this court, the trial court correctly held that plaintiff's lien was discharged by the decree entered in the Superior Court foreclosure proceeding. The order of the Circuit Court dismissing plaintiff's complaint should be affirmed.

APPROVED.

BURKE, P.J. AND KILSY, J. CONCUR.

1. The first part of the report is a general introduction to the subject of the study.

2. The second part of the report is a detailed description of the methods used in the study.

3. The third part of the report is a discussion of the results of the study.

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7. The fourth part of the report is a conclusion of the study.

8. The fifth part of the report is a list of references.

9. The sixth part of the report is a list of appendices.

10. The seventh part of the report is a list of figures.

11. The eighth part of the report is a list of tables.

12. The ninth part of the report is a list of footnotes.

13. The tenth part of the report is a list of acknowledgments.

14. The eleventh part of the report is a list of abbreviations.

15. The twelfth part of the report is a list of symbols.

16. The thirteenth part of the report is a list of units.

17. The fourteenth part of the report is a list of definitions.

18. The fifteenth part of the report is a list of terms.

19. The sixteenth part of the report is a list of acronyms.

20. The seventeenth part of the report is a list of initialisms.

21. The eighteenth part of the report is a list of abbreviations.

22. The nineteenth part of the report is a list of symbols.

23. The twentieth part of the report is a list of units.

24. The twenty-first part of the report is a list of definitions.

25. The twenty-second part of the report is a list of terms.

26. The twenty-third part of the report is a list of acronyms.

27. The twenty-fourth part of the report is a list of initialisms.

28. The twenty-fifth part of the report is a list of abbreviations.



WINIFRED BURKE,

Appellee,

v.

PIPER'S SUPER SERVICE STATION,  
an Illinois corporation,

Appellant.

L. F. BURKE

1941

CHICAGO, ILL.

3151 056<sup>2</sup>

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

The cause in this case is a personal injury suit which was submitted to the court without a jury. At the conclusion of the evidence the court found the issues in favor of the plaintiff and entered judgment against the defendant in the sum of 750.00 and costs. From this judgment the defendant appeals to this court.

From the record it appears that it was alleged in the complaint that in May, 1939, the defendant operated a gasoline service station known as Piper's Super Service Station at 7200 West Addison street, Chicago, Illinois. That on the day of the accident, plaintiff stopped at the station to visit the washroom and when plaintiff inquired of the attendant in charge for the location of the rest room she was told to - "go around to the back" - and that she followed these instructions and went around to the rear of the premises to enter the rest room, or what she expected to be the rest room, and walked into an open stairway, down which she fell and was injured. The complaint alleges the duty upon the part of the defendant to exercise ordinary care to maintain its premises in a safe condition for the use and purpose for which it was intended and for the use of persons rightfully upon the premises, and charges that her accident and injury were caused by the negligence of the defendant as aforesaid. Defendant denied that it was in possession of or had control of the gasoline station at the time of the accident and denied the other affirmative allegations of the complaint.



The theories upon which this case was tried are that plaintiff contends that the defendant was in the possession and control of the gasoline station where plaintiff received her injuries and that on May 6, 1939, at about 11:15 P. M. plaintiff, in company with several other persons, drove up to the gas station; that the driver of the automobile asked an attendant there where the rest room was and was directed by said attendant to "go around to the back"; that the attendant who directed her was an agent or servant of the defendant, and that following the instructions of the defendant's agent, and while exercising due care and caution for her own safety, she walked around to the back of the building in search of the restroom and walked into the open stairway, whereby she was injured. Defendant's theory, on the other hand, is that at the time and place referred to in the complaint, the defendant did not own or have possession and control of the gas station or the premises where plaintiff was injured; that the ownership of the premises was in the Silver Flyer Petroleum Company, Inc., who had leased the premises to one Julius Fittel, who was in possession and control of the premises at the time plaintiff received her injuries; that the attendant at said filling station was the servant or agent of Julius Fittel and had no connection of any kind with defendant; that, therefore, there was no duty upon the defendant to use reasonable care for the safety of the plaintiff, and that the defendant could not be guilty of any negligence.

Further, the defendant contends that plaintiff was not an invitee upon the premises but was a licensee only, for the reason that neither she nor any members of the party in the automobile came to the premises for the purpose of transacting any business; that the only duty owed to her by Julius Fittel, the man in the possession and control of the premises, was not to wilfully or wantonly injure her. As we have already indicated, the defendant denies that the attendant at the gas station was its agent, but contends that the attendant was the servant or agent of Julius Fittel, and denies

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that the attendant directed plaintiff to go around to the back or rear of the premises where there was no rest room; that there was a misunderstanding in this regard.

From the evidence in the record it appears that plaintiff was a single woman doing clerical work for the Mark Shoe Store at the time of her injury and was earning \$16.00 per week. About 11:15 P.M. on May 8th, 1939, she, together with others in an automobile, approached a certain gasoline station located at 7200 West Addison Street where they stopped for the purpose of using the ladies' rest room. The station was well lighted in the front part of it, and the name - "Piper's Gasoline Station" - appeared in large signs over the premises; that the plaintiff, when she stopped at the gasoline station, inquired for the location of the ladies' rest room and when one of the attendants at the gasoline station motioned with his hand toward the rear of the station and said - "around the back"; that she then went around toward the back part of the station where there were no lights and where it was very dark; that when she stepped through the door which she expected would enter into the rest room, she fell a distance of about eight feet into an open stairway where she sustained injuries to her person. Around this stairway there was no guard rail which would prevent persons from walking into it at the time of the accident.

The plaintiff offered evidence on the question of ownership of the station which is to the effect that the premises at 7200 West Addison Street were owned by the Piper's Super Service, Inc., and that Piper's was the trade name under which the stations operated; that the Silver Flyer Petroleum Company furnishes fuel, gas and oil to the stations or to some of them and that Walter Piper, Jr. was president of both the Piper's Super Service Corporation and the Silver Flyer Petroleum Company. The defendant introduced evidence to show that there was some sort of a lease between the Silver Flyer



Petroleum Company and one Julius Pittel and that at the time of the accident Pittel was operating this station at 7200 West Addison Street under lease. The defendant had lost the lease but introduced Exhibit No. 5 as a correct copy of a form used for that type of lease. Notwithstanding the fact that the lease had been lost and that the defendant claims it had no control over the premises, its witness testified that he remembered that the accident was reported to the defendant. It was further admitted by their witness that both the Piper Super Service Station and the Silver Flyer Petroleum Company had their main offices at 7130 North Western Avenue where Walter Piper, Jr., was president of both companies and admitted that the name of Julius Pittel upon whom the defendant sought to cast the burden of operation and control, was not on the outside of the building and that the only name on the outside of the building was "Piper's".

It also appears from the evidence offered by the defendant that this service station was known as Piper's Super Service Station No. 12; that all their service stations were called "Piper's Super Service Station"; that the name Silver Flyer Petroleum Company did not appear on that station; that defendant operated some of the service stations itself; and that all these stations would "look very much like the one at 7200 West Addison Street". The attendant at the gasoline station testified that the rest room was inside the gas station and not around the back of it, but he admitted that - "I pointed with my right hand", but contended that he meant to point in the direction toward the interior of the station. It does not appear that there is any question as to the accident happening nor as to whether plaintiff sustained the injury claimed. Nor is it disputed that the accident happened in exactly the manner plaintiff says it happened. Further, it is admitted by defendant





that it was the custom in the operation of the station to permit people to use the rest room upon request.

The defendant contends that the evidence establishes that it neither owned nor was in possession and control of the premises where plaintiff received her injuries, and that the fact that the defendant's name appeared upon the premises only gave rise to a presumption that defendant owned or was in possession and control, and contends that such presumption, if any, was dissipated by positive evidence. In answer to defendant's denial of ownership and control over the premises, the plaintiff contends that the evidence establishes that the defendant had control over the operation of the premises in question and that the defendant held itself out to the public as being the owner and proprietor of the said gasoline station.

In considering the question of ownership and control, it appears from defendant's exhibit No. 1, which is a clear photograph of the station involved, that no name appears upon the station as owner, proprietor or lessee, other than Piper's, and that that name appears in very large and distinct letters. Further consideration of defendant's Exhibit No. 2 - a photograph of the station taken at a much greater distance - shows that the word "Piper's" is distinct, despite some obstructions in the way, and its exhibit No. 3 shows another dangerous condition to exist on the premises, but not connected with this accident, and that this station was designated as station No. 12. There does appear a sign on the rest room door inside the station. Further, it appears from what we have here in the way of defendant's exhibits that the only person or concern whose name appears on the premises is that of "Piper's". The name of Julius Pittel was not on the outside of the building, the only name being that of "Piper's". We might mention in this connection that the person known as Julius Pittel never appeared on the premises at the time of the accident, nor so far as the



evidence indicated did he appear at the trial of the case. The case of Vera Cornwell v. Leiter Building Stores, Inc., 259 Ill. App. 460, is called to our attention by plaintiff as having some bearing upon the question of ownership and control, which is the disputed question. In that case, a beauty parlor was operated in the Leiter Stores. The store occupied a large building covering about one half a city block on State Street running from Van Buren to Congress Streets in Chicago. The store leased portions of its premises under agreements which it chose to call a lease or a license to a number of merchants to operate small shops in the store, and one of these so-called licensees operated the beauty parlor. The Cornwell woman was injured while a patron in the beauty parlor. No fixed money rental was charged these concessionaires or licensees, but the Schreiber Beauty Parlors, Inc., operated the beauty parlor under an agreement whereby it would pay to the Leiter Stores a sum equal to 12½% of the gross income from the beauty parlor. Under the terms of that agreement, the Leiter Stores reserved the right to direct the general policy of the business of the beauty parlor including the character of merchandise it would sell and all of the advertising to be done by the beauty parlor. In the Cornwell case (supra) this court approved what was said in Fields, Inc., v. Evans (Ohio App.), 172 N. E. 702, where the opinion held:

"Where a corporation holds itself out as the owner or proprietor of such a beauty shop, located within its own store building, and apparently a part of its store, and a person comes to such store, goes in, and therefrom enters the beauty shop for the purpose of obtaining service, without knowledge that a third person is the owner and proprietor and has control of the beauty shop, but relying and having a right to rely wholly upon the holding out of such person or corporation, such corporation so holding itself out is liable for the actionable negligence of the operator in the beauty shop in giving treatments."

In support of the conclusion reached by this court in the Cornwell case, the case of Augusta Friedman's Shop, Inc. v. Yeates, 216 Ala. 434, is cited. In that case it was held that defendant having held itself out to the public as the owner or proprietor of the beauty



shop could not escape liability by asserting that the particular shop was owned and operated by another, the opinion saying that the jury could well infer from the evidence that plaintiff believed the beauty shop was operated by defendant and relied upon this fact in having her hair dressed. Further, this court relied upon Hannon v. Siegel-Cooper Co., 157 N. Y. 244, where plaintiff was injured by a negligent operation on her teeth and defendant asserted that the dental business was conducted by a Mr. Hayes individually, and it was held that, where one contracts with the ostensible owner, he has a right to rely upon the presumption that the defendant would employ only skilful workmen to perform the services. The same principle was approved in Morris & Co. v. Malone, 200 Ill. 132, where it was sought to introduce evidence tending to show that Morris & Company was acting as agent for Fairbank Canning Company at the time of the accident. Such evidence was excluded on the ground that it had not been disclosed to the injured person that Morris & Company was acting as agent for any one and that so far as known by the public and the workmen employed the work was performed by Morris & Company, and that it was liable to the same extent as if it were a principal.

And so, it is apparent from the facts as they are related in this case, that the defendant is seeking to avoid responsibility for the accident that occurred because of its contention that it did not own nor control the premises and gasoline station in question, while the public and anyone entering the premises for purchasing gasoline and oil or other services, such as rest room services as might be required by its customers or by occupants of customers automobiles, would assume from looking at the notices and sign boards that the defendant, Piper's Super Service Stations, was the party doing business at the point and premises in question. Such notices and signs as appeared on the premises would induce the public to patronize this station as one belonging to and



controlled by the defendant. Upon the facts of this case and under the authorities called to our attention, we approve of what was said in the case of Cornwall v. Leiter Stores, Inc., (supra), as applying to the instant case.

The defendant raises the question that plaintiff was not an invitee on the premises and cannot recover in this suit under the allegations of the complaint. This suggestion seems to rest on the facts that the operator of the automobile neither purchased nor intended to purchase any gasoline or transact any business with the attendant of the filling station, and upon the contention that the rest room in the office of the building was for the use of customers who had business with the filling station and not for the general public. It appears from the evidence that the attendant would let people use the rest room if they came there and asked to use it. On the occasion in question the attendant motioned toward the back of the station without making any objection to the use of the rest room by the plaintiff. The plaintiff proceeded to the back of the station and was injured as we have already indicated. In our opinion the facts are such as would make the defendant liable under the allegations of negligence contained in the complaint. The plaintiff cites Fredericks v. Atlantic Refining Company, 127 Atl. 615, not as a case in point, but announcing the law to be that one inviting another to his place of business assumes toward him certain duties and is liable if he negligently permits a danger of any kind to exist which results in injury to the person invited without negligence on his part. There was evidence of the witness Webber that "if someone came up and asked to use it, we would let them use it. Many times people would stop at the gasoline station and ask to use the rest room and I would let them use it". Upon permitting the invitee - as we shall refer to plaintiff - to make use of the rest room, the defendant became liable if she was injured





through defendant's negligently permitting a danger to exist - assuming, of course, that plaintiff was free of contributory negligence. The case of Levansy v. Otis Elevator Co., 251 Ill. 28, is cited by plaintiff as authority that if the owner or occupant of premises directly or by implication invites persons to come upon the premises the law imposes upon him the duty to use reasonable care to see that the premises are in reasonably safe condition, so that such person shall not be injured while using the premises for the purposes for which the invitation was extended. Upon consideration of the question, therefore, we are inclined to sustain the trial court in reaching the conclusion that the plaintiff was an invitee on the premises in question.

The defendant further contends that plaintiff was guilty of contributory negligence as a matter of law, and suggests that nowhere in the record is there any evidence to indicate that plaintiff was in the exercise of reasonable care for her own safety; that the direction of the attendant "to go around back" did not give her any indication as to where a rear room or toilet was located in the rear of the premises; that she chose to walk along an unfamiliar place in the dark and stepped into a stairway which she did not see because of the darkness. It is contended that under the circumstances as shown the plaintiff failed to prove that she was in the exercise of due care for her own safety. The plaintiff's reply is that the cases cited by defendant on the question of contributory negligence as a matter of law are not in point here since they were cases where it was held that there was no conflict in the evidence and that the undisputed evidence clearly showed that injury was the result of the negligence of the party injured. Plaintiff cites Franey v. Union Stock Yards Co., 235 Ill. 522, where the facts were that plaintiff had brought some cattle to the stock yards. He went back to water his hogs, and the water spout being difficult to turn into the pen where his hogs were, he climbed the



fence into what he supposed was the adjoining pen for the purpose of adjusting the spout. Plaintiff actually climbed into a "cut-off" from the adjoining pen, through the floor of which a big hole had been cut for the purpose of giving light to the adjoining premises, through which hole the plaintiff fell and was injured. In that case the Supreme Court held that he was not guilty of contributory negligence as a matter of law.

It has long been the general rule that it is not contributory negligence for a party to act on the assumption that another will not be guilty of negligence. Plaintiff cites as authority for this rule, Hickey v. E. C. Railway Co., 148 Ill. App. 197; and Elgin J. & E. R. Company v. Hoadley, 220 Ill. 462. For the rule that one acting upon the direction, invitation or assurance of safety of one upon whom he has a right to rely cannot be charged as being contributorily negligent in an action against the person causing such direction or such invitation, plaintiff cites C. & A. Railroad Co. v. Gore, 204 Ill. 186; Lakeshore & M. & E. Co. v. Brown, 123 Ill. 162. Considering all the authorities called to our attention, we are of the opinion that plaintiff was not guilty of contributory negligence such as to bar her recovery, and that the court was justified in finding the issues for the plaintiff and entering judgment against the defendant.

For the reasons stated in this opinion, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.



GEN. NO. 9694

AGENDA NO. 8

IN THE APPELLATE COURT OF ILLINOIS,  
SECOND DISTRICT  
OCTOBER TERM, 1941.

NATIONAL MIRROR WORKS, a Corporation,

Appellee,

vs.

J. C. THOREN,

Appellant.

APPEAL FROM CIRCUIT COURT  
WINNEBAGO COUNTY.

HUFFMAN - P.J.

This suit originated in a Justice of the Peace Court. Appellant was engaged in the manufacture of showcases and display fixtures. The appellee was engaged in the glass business. Appellant made divers purchases of glass from appellee to be used as showcase tops, and otherwise in display fixtures. The transactions between the parties covered a prolonged period of time, together with divers shipments of glass by appellee to appellant, and payments on account from time to time made by appellant to appellee.

Appellee instituted suit in the Justice Court for \$391.56. Appellant urged a counterclaim in that suit in the sum of \$498.39, claiming that certain glass ordered was not cut according to specifications and that it was either a loss to appellant or that he was compelled to incur expenses in altering the showcases and display fixtures to make them fit the glass furnished by appellee.

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

It appears that appellee recovered the sum sued for in the Justice court, and that appellant failed to make any recovery on his counterclaim. He prosecuted an appeal to the Circuit court, where at the close of the evidence the Court instructed the jury to return a verdict for appellee in the sum of \$391.56, plus interest at five per cent from July 6, 1940. Accordingly, verdict was returned for appellee and against appellant in the sum of \$403.46, and appellant denied any damages by virtue of his counterclaim.

It appears that appellant had the various wooden parts of the showcases and display fixtures sawed to specification at a mill in Rockford, after which the frames would be assembled, ready for such glass as was to be used in connection therewith. Appellant claims that after the frames were assembled, in many instances the glass did not fit in the slots and grooves provided therefor in the cases and fixtures, and that in many instances he was compelled to employ the services of a workman in order to alter the grooves of the cases and fixtures so that the glass would fit, and that in many instances he was unable to use certain glass, all to his damage as aforesaid. However, during this time dealings were had between the parties, together with orders and remittances from appellant. There came a time when appellee was unable to make delivery as promptly as desired, and dealings between the parties evidently ceased. The record is somewhat vague in this regard. It appears from the testimony of appellant that he did not offer to return the glass which he claimed was unfit for use, because of the alleged agreement of appellee to make it good. It further appears from his testimony that some time prior to the inception of the suit against

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him, the representative of appellee requested him to sign a thirty day note for \$391.56; that he offered to sign such note for sixty days, and at such time he did not claim that he owed appellee less than the requested amount. The note was not given and this suit resulted.

The evidence has been carefully reviewed and we see no good purpose in detailing the same here. We find no reversible error in the record and the judgment of the trial court is therefore affirmed.

Judgment affirmed.



IN THE APPELLATE COURT OF ILLINOIS,  
SECOND DISTRICT  
OCTOBER TERM, 1941.

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

vs.

PAUL SIEX,

Plaintiff in Error.

WRIT OF ERROR TO COUNTY COURT  
OF WHITESIDE COUNTY.

312 I.A. 657<sup>2</sup>

HUFFMAN - P.J.

Plaintiff in error was convicted in the County Court of Whiteside county upon two counts of an information charging him with the illegal possession and illegal sale of intoxicating liquor. Trial was had before the court, without jury. The court found defendant guilty and pronounced judgment upon each count, from which the defendant has prosecuted this writ of error.

Plaintiff in error urges that the finding of the court is not supported by the evidence, and that the affidavit to the information was insufficient in law.

With respect to the first point above indicated, we find that the evidence on the part of the People is sufficient to support the finding. The court saw and heard the witnesses and it was within its province to judge of their credibility.

With respect to the second point urged by plaintiff in error, we do not find either the information or the affidavit in support

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to form a  $2 \times 2$  matrix  $\mathbf{A}$  and a vector  $\mathbf{b}$  such that

...the ... ..

doi:10.1017/S0022292412001707 Printed in the United Kingdom

• What is the main idea of the passage?

File # \_\_\_\_\_ Date of birth \_\_\_\_\_

- 11 -

7. 讨论: 为什么在  $\mathbb{R}^n$  中, 任意两个子空间的交集的维数满足

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THOUGHTS AT JIVEBIRTS

thereof to be included in the abstract. It is essential that the abstract contain sufficient contents of the record to fully present every error relied upon for reversal. This rule is so well established that citation is unnecessary.

However, reference to the record discloses that the body of the affidavit reads as follows:

"State of Illinois,  
Whiteside County, SS.

Ted Dobers after being duly sworn, on his oath states that the within information and the matters and facts therein stated against Paul Siex are true in substance and in fact."

The affidavit is signed by the affiant and sworn to before the County Clerk.

The cases urged by plaintiff in error against the sufficiency of the above affidavit are well illustrated by that of *The People v. Arey*, 318 Ill. 305, wherein it is held that an information can not be verified on information and belief, but that the affidavit in support thereof must be sworn to positively, so that a charge of perjury would lie if the same is false. The affidavit in the case of *People v. Arey*, supra, read:

"Leslie L. Wilbourn, after being duly sworn, on his oath states that the within information against Albert Arey is true, as he is informed and believes."

The difference between this affidavit and the one involved in the case at bar is at once apparent. The affidavit now under consideration is substantially in the same form as that in the case of *The People v. Mankus, et al.*, 215 Ill. App. 518, 522.

Positive averments of the affidavit are not affected by unnecessary recitals. The affidavit in this instance charged that

1771/12/14

2000

*[Faint handwritten notes at bottom]*

Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains. The concentration of the *Agrobacterium* suspension was 10<sup>6</sup> cells/ml (○), 10<sup>7</sup> cells/ml (□), 10<sup>8</sup> cells/ml (△), and 10<sup>9</sup> cells/ml (◇). The error bars represent the standard deviation of three independent experiments.

... true

[illegible]

the affiant, "after being duly sworn, on his oath, states that the within information and the matters and facts therein stated against Paul Siex are true in substance and in fact." Thus, we find that the affidavit is not based upon information and belief, but upon facts within the knowledge of the party making the same, and charges that the matters and facts therein stated against the defendant are true. We do not consider that the words, "in substance and in fact" in any way affect the positive averment therein contained, that the matters and facts stated against the defendant are true. We deem the affidavit to be sufficient, and the judgment of the trial court is therefore affirmed.

Judgment affirmed.





GEN. NO. 9728

AGENDA NO. 27

IN THE APPELLATE COURT OF ILLINOIS,  
SECOND DISTRICT  
OCTOBER TERM, 1941.

FRANK E. WINGERT,  
Appellee,

vs.

EMMA WINGERT,  
Appellant.

312 I.A. 658

APPEAL FROM CIRCUIT COURT  
LEE COUNTY.

HUFFMAN - P.J.

Appellee instituted action for divorce against appellant, charging desertion. Appellant answered the complaint, denying such charge, and filed her counterclaim for separate maintenance. The husband answered the counterclaim, denying the charges therein made. The court, after hearing the evidence, granted divorce to appellee and denied the wife any relief under her counterclaim. She brings this appeal.

On October 24, 1935, the Rev. Frank E. Wingert was wedded to appellant. It was the third venture for each of them, but it did not carry with it the traditional charm of a third attempt. Failure, frustration and disappointment, with the results naturally to be expected, followed. Appellee was of advanced years. From appellant's testimony, it appears that the biological impulse was the impelling motive of appellee in contracting this marriage, but in this, he was entirely misguided, as time had exacted its toll.

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The parties drifted apart, and after a time, this suit resulted. No property rights of any consequence are involved. Appellee states that he would receive the collection money on Sunday, as his pay; that it would amount to about \$1.25; and that appellant would take one-third thereof as her share, stating to him that he reminded her of the devil when he entered the pulpit, all of which was very disconcerting to appellee. It would serve no good purpose to go into detail. The trial court heard the witnesses and had much better opportunity to judge of the situation than this court.

We find no reversible error in the record, and the decree is affirmed.

Decree affirmed.

affirmed.  
We find no reversible error in the record, and the record is  
opportunities to judge of the situation from this court.  
detail. The trial court heard the witnesses and had much better  
concerning so involved. It would appear as though proper to go into  
of the devil when he entered the subject, and which is very in-  
one-third thereof - how many, and that he included for  
that it would amount to about \$1.50; and that defendant could take  
that he would receive the attention which on Sunday, as witness  
No property rights of any consequence are involved. Answered as asked.  
The parties waived their right to be heard on this point, and it is so recorded.

Sept 1978 649990

AGENDA NO. 30

LLOYD SMITH,  
APPELLANT,  
vs.  
HELEN BRUNER and  
NELSON BRUNER,  
APPELLEES.

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: APPEAL FROM THE CIRCUIT  
COURT OF OGLE COUNTY.

312 LA.

This is a habeas corpus proceeding by appellant against the appellees to recover custody of his child who is now approximately eleven years old. Appellant by his petition alleges that he has requested appellees on several occasions to deliver custody of his child to him, but that they have refused. This suit resulted. Appellant sets out in his petition that he is the father of the

[illegible]

child, that her mother is deceased, that he is a person of good moral character and financially able to care for, support and educate said child, is willing and desires to do so; and that appellees are of no blood relation whatever to the child.

Appellees by their answer admit appellant to be the father of the child; deny that they in any way restrain her of her liberty; state that they are not informed as to appellant's financial ability to support and educate the child, or of his good moral character, or of his willingness to take custody of, and support and care for the child. They allege that appellant deserted and abandoned the child and its mother, and failed to support either of them. They admit they are in no way related to the child, but assert that its welfare will be best served by remaining in their custody.

Upon hearing, the court denied the custody of the child to appellant, ordered that the custody should remain with appellees, and dismissed the writ. Appellant has brought this appeal from the above action of the court.

The evidence discloses that appellant for the past four years has lived in Oakland, California; that he is by trade a linotype operator, and makes on an average of \$52.00 a week at such trade; that he is employed by the San Francisco Chronicle, a daily newspaper published in that city; that his present wife operates an art store which they own, and that their combined earnings average \$4,000, a year. Appellant states that he desires custody of his daughter, and that he is financially able to support and educate her; that his wife knows the child and joins with him in their desire for its custody; that they have no children as a result of their marriage. Four witnesses testified as to the fitness of appellant to have the custody of the child. Appellees make no attempt to dispute the moral fitness of appellant or his financial





ability. The only ground they seek to urge is the separation between appellant and the mother of the child with a resulting neglect and indifference toward them by appellant prior to the death of the mother. We find nothing in the evidence tending to show his unfit character or his lack of financial ability, and nothing to indicate a lack of parental love for his child, other than the difficulty which apparently existed between appellant and his first wife causing the separation. Her home was at or near Mt. Morris, and she continued to make her home there, where it appears she owned or had an interest in certain farm lands.

Under the above circumstances, it appears that the prevailing rule as announced in *Wohlford v. Burckhardt*, 141 Ill. App. 321, and *Stafford v. Stafford*, 217 Ill. App. 548; 299 Ill. 438, must control. There is ample evidence to show that the father is a competent person to have the custody of his child; that he desires such custody; and that he is financially able to support and educate the child. We find no evidence offered to disprove such facts. A parent has a right to the custody of his child as against the world where it appears that he is a competent person to have such custody, is not wanting in such principles of character as render him unfit, and has not been guilty of such conduct toward the child as to have forfeited such right. It does not appear in this case that the welfare of the child demands that its custody shall be elsewhere than with its father.

The judgment is therefore reversed and the cause remanded with directions that custody of said child be awarded appellant.

Reversed and remanded with directions.



IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

October Term, A.D. 1941

MARY E. WOODWORTH,

Appellant,

v.

M. P. NELSON and  
ANNA SANDIN,

Appellees.

APPEAL FROM THE  
CIRCUIT COURT OF  
WINNEBAGO COUNTY.

6591

Dove, J.

Appellant brings to this court for review a judgment of the circuit court of Winnebago County rendered in favor of appellees on a directed verdict in a suit for damages brought against them by appellant. The complaint charged that the appellees entered into a conspiracy to defraud ~~her~~<sup>appellant</sup> out of her property through a fictitious assignment of a real estate mortgage, afterward foreclosed, and inducing her to refrain from redeeming within the redemption period.

Charles E. Woodworth, now deceased, and appellant, who was his wife, borrowed \$2000.00 from M. P. Nelson on October 20, 1931, and executed a promissory note due three years after date, secured

Yours truly,

W. H. H.

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by a mortgage on certain real estate and delivered said note and mortgage to Nelson. Thereafter, the interest being in default, Anna Sandin, as assignee thereof, by Nelson as her attorney, instituted a foreclosure proceeding resulting in a decree of foreclosure and sale on January 3, 1934. The property was sold by the master on February 7, 1934 to Anna Sandin for \$3,074.46, and a certificate of purchase was issued to her. She was not present at the sale, but Nelson attended the sale and bid for her. At the expiration of the redemption period, Anna Sandin received a master's deed for the premises.

In July, 1938, appellant filed an action in the nature of a bill of review. The complaint alleged a conspiracy among the parties to this cause and successive subsequent grantees of the premises to cheat and defraud her out of the property; that Anna Sandin was a fictitious and non-existent person; that after the foreclosure decree and before the sale she tendered to Nelson the full amount necessary to redeem the property; that Nelson told her he was no longer interested in the property and she would have to see Anna Sandin; that she made several attempts to locate Anna Sandin, and she could not be found; and that she was at all times thereafter ready and willing to redeem the property. Other alleged fraudulent acts not pertinent here were charged. The chancellor sustained a motion to strike the complaint and dismissed the suit for want of equity. On her appeal to the Supreme Court the decree was affirmed. (Woodworth v. Sandin, 371 Ill. 302.) In the opinion, the court pointed out that she had appeared in the foreclosure proceeding and filed an answer; that she did not contend she had any defense thereto; that she did not allege she asked Nelson to tell her the residence of Anna Sandin, or seek information from him as to whom she could make payment. It is particularly to be noticed that the court said: "She does not aver that Nelson



made any statements or promises to let her redeem after the statutory period had run or that she was induced to delay by anything he said, <sup>did or</sup> ~~or~~

Thereafter the instant action was commenced in April, 1939.

A complaint and two amended complaints in chancery were filed, all of which were dismissed on motion of appellees. The cause was then transferred to the law side of the docket and the complaint under consideration was filed, charging a conspiracy to defraud by an alleged fictitious assignment of the mortgage and inducing appellant to not redeem before the redemption period expired.

Anna Sandin, called as an adverse witness under section 60 of the Civil Practice Act, testified she bought the mortgage on October 20, 1931, the day it was assigned to her by Nelson, with money she did not keep in a bank because it had closed; that she kept the papers in a safety deposit box and that Nelson collected the interest thereon for her until the default. Another witness called by appellant, testified she heard Mrs. Sandin say the money came to her by reason of her son's death. Mrs. Sandin's testimony as to the actual purchase of the mortgage is not discredited by any fact or circumstance in evidence and effectually refutes the claim of appellant that the assignment was fictitious.

Appellant testified that at the foreclosure sale: "I asked him (Nelson) how much time he was going to give me to redeem. He said we could have all the time we wanted. It was twelve and then fifteen months he would give us. He said I could have all the time I wanted, nothing to worry about;" that in the latter part of April, 1935, she received notice from Nelson that the master's deed was to be issued in about two weeks, and went to the office of her attorney, Thomas Gill, who called Nelson by telephone and told him appellant was there relative to planning redemption; that she heard Nelson's reply and later went to his office to verify the

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conversation; that in the presence of witnesses Nelson repeated the same words: "Don't worry, we will plan your redemption and we will see that you have your property back by the first of September;" and told her not to go to any other lawyer; that immediately afterward, on the same day, she found Mrs. Sandin and told her of the visits to the offices of Judge Gill and Nelson. She testified: "And then we told her we were going to redeem," and that Mrs. Sandin said she didn't know anything about the business and that Nelson was her attorney and anything he did was all right with her; that she did not tell Mrs. Sandin when they were going to redeem; that she saw her in the Spring of 1934, and after the sale; that the third time was in April or May, 1935, and she did not think she ever saw Mrs. Sandin again except at the court house; that she had several persons working on the redemption, and that on the next day after the conversation with Nelson she told one of them, James Maggio, not to work any more, as Judge Gill and Nelson were going to plan the redemption the first of September. She further testified that afterward, she talked to Judge Gill about redeeming the property and he told her that if she could get a party to redeem, to bring them in to him and it would be all right. She testified she did not write Judge Gill any letter while he was her attorney. When a letter from her to him was shown her, she equivocated about it but finally admitted she wrote it. When it was offered in evidence she objected to it on the ground that it was a privileged communication and it was excluded.

Lelia Blay testified she and her daughter were with appellant on the occasion when she went to the offices of Judge Gill and Nelson and to see Anna Sandin; that Nelson told her to go home and not to worry; that when the foreclosure came they would take care of her; and that Anna Sandin said she had nothing to do with it and that Nelson was her attorney and handled all her affairs.



Adelia M. Young testified she was with appellant at the foreclosure sale; that she asked Nelson why appellant had only twelve months, and supposed that for foreclosure they had fifteen months or more, and that he replied: "She can have all the time she wants."

James Maggio testified that at appellant's request he tried for about thirty days in April or May, 1935, to secure a loan for her, and later on she discharged him. Anna Sandin testified she had a conversation with appellant between February 13, 1934 and November, 1935, but not before September 1, 1935; and some conversations with her afterward, but she would never pay anything; that appellant wanted her to deed the property back and had no money, but was going to raise some; that when the witness asked \$3000.00 they laughed at her; that nothing was said to the effect that appellant could have all the time she wanted to redeem; that at one conversation, the date of which she did not remember, appellant and two other ladies came to see her; and that she told appellant that if she would raise \$3000.00, she could remain on the premises until September first and take the rents.

The testimony does not show any element of a conspiracy. It does not show she relied upon the alleged statements of Nelson or was thereby induced to refrain from redeeming. By her own testimony, it appears that at the foreclosure sale, "It was twelve and then fifteen months he would give us." Two weeks before the time for issuing the master's deed Nelson sent appellant notice of the time it would be issued. He was under no obligation to do so. If he had been attempting to keep her from redeeming within the redemption period, it is obvious he would not have notified her. The notice tends to show he was trying to help rather than to hinder appellant. It is significant that in the conversation which appellant testified she had with Anna Sandin immediately



after the visit to Nelson's office, she says she told Mrs. Sandin: "We are going to redeem." If Nelson had told her what she testified he said, there would have been no occasion for visiting Mrs. Sandin. All these circumstances appear from her own testimony. Taken in the light most favorable to appellant the testimony on her behalf does not show any conspiracy or any concerted acts between Nelson and Anna Sandin, or any purpose of either of them, to induce appellant to refrain from redeeming her property within the redemption period.

Furthermore, her bill of review, filed in 1933, long after the conspiracy charged in this case, made no mention of it. In that case, she alleged she had been unable to find Anna Sandin, while in this case she testified she had seen her in 1934, and after the sale and a third time in May, 1935. Her claims in the two cases are not in accord, and indicate the charges here were an after thought. The proofs do not sustain them. The law does not tolerate piece-meal litigation. The trial court correctly directed a verdict for appellees and the judgment will be affirmed.

Judgment affirmed.

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

October Term, A.D. 1941

Trustees of Schools of Township  
No. 20, Range No. 5, Whiteside  
County, Illinois,

Appellant,

v.

Central National Bank of Sterling,  
Illinois, a Corporation,

Appellee.

APPEAL FROM THE  
CIRCUIT COURT OF  
WHITESIDE COUNTY.

DOVE, J.

Appellant brought suit against appellee in the circuit court of Whiteside County to recover the amounts paid by the township school treasurer to retire nine tax anticipation warrants, and was appealed from a judgment in favor of appellee.

Each of the warrants was payable to appellee, directed "To the Township Treasurer of School District No. ---, Lyndon Township, Whiteside County, Illinois", and signed: "D. F. Millikan, Clerk of the Board of





Trustees of District No. ---, Lyndon Township, Whiteside County, Illinois", with the numbers of nine respective school districts inserted in the blank spaces. Each warrant recites it is issued pursuant to a resolution <sup>adopted</sup> by the Board of School Trustees of the district whose number appears in the warrant. The resolutions were signed by each of the three trustees of schools. Their signatures are followed by the words: "School Trustees for District No. ---, Lyndon Township, Whiteside County, Illinois", with the district number inserted in the blank space.

The payments in controversy were made by the School Treasurer through the proceeds of two checks from the county treasurer to the school treasurer for taxes collected in the respective school districts. One of the checks was for \$6919.32. It was deposited in the account of the school treasurer in appellee bank, and in turn he gave appellee a check for the same amount, which was applied on the warrants. The other check was for \$4036.51. Out of it \$2036.51 was applied on the warrants without being deposited in the treasurer's account, under his written directions, giving the number of each school district and the several amounts to be applied. The remaining \$2000 was deposited in his account. It is not claimed that any money of any school district was applied on any warrant purported to be issued for the benefit of any other district.

The claim of appellant is that the warrants are invalid because not executed by the school directors of the several school districts under section 117 of the School law (Ill. Rev. Stat. 1941, Chap. 122, par. 125), and that consequently appellee is liable for the amounts applied on the warrants because it well knew that the money received from the school treasurer was public money, that it was not in satisfaction of any valid obligation of appellant or the school districts, and that the payment was without consideration and was unauthorized by appellant and was illegal.

minutes of January 10, 1967, at which time the Board of School Trustees of the City of Chicago adopted the resolution referred to above by the Board of School Trustees of the City of Chicago. The resolution was followed by the adoption of the following resolutions:

Yndon Johnson, President of the American Revolution Bicentennial Commission, Chicago, Illinois, June 1, 1967.

Printed in the Chicago Press.

REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE  
IN RESPONSE TO A RESOLUTION OF THE HOUSE OF REPRESENTATIVES  
PASSED MAY 10, 1890  
RELATIVE TO THE LANDS BELONGING TO THE UNITED STATES  
IN THE TERRITORY OF ARIZONA  
AND  
THE LANDS BELONGING TO THE UNITED STATES  
IN THE TERRITORY OF NEW MEXICO  
AND  
THE LANDS BELONGING TO THE UNITED STATES  
IN THE TERRITORY OF COLORADO  
AND  
THE LANDS BELONGING TO THE UNITED STATES  
IN THE TERRITORY OF ILLINOIS  
AND  
THE LANDS BELONGING TO THE UNITED STATES  
IN THE TERRITORY OF INDIANA  
AND  
THE LANDS BELONGING TO THE UNITED STATES  
IN THE TERRITORY OF KENTUCKY  
AND  
THE LANDS BELONGING TO THE UNITED STATES  
IN THE TERRITORY OF LOUISIANA  
AND  
THE LANDS BELONGING TO THE UNITED STATES  
IN THE TERRITORY OF MISSISSIPPI  
AND  
THE LANDS BELONGING TO THE UNITED STATES  
IN THE TERRITORY OF ALABAMA  
AND  
THE LANDS BELONGING TO THE UNITED STATES  
IN THE TERRITORY OF GEORGIA  
AND  
THE LANDS BELONGING TO THE UNITED STATES  
IN THE TERRITORY OF FLORIDA  
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THE LANDS BELONGING TO THE UNITED STATES  
IN THE TERRITORY OF CALIFORNIA  
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IN THE TERRITORY OF ARIZONA  
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IN THE TERRITORY OF FLORIDA  
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THE LANDS BELONGING TO THE UNITED STATES  
IN THE TERRITORY OF CALIFORNIA

and that the payment was without consideration and was not a gift by appellant and was ill-gotten.

The court heard the cause without a jury. After the trial, appellee, by leave of court, filed an amended answer averring that in purchasing the warrants and as a part of the same transaction, appellee credited the account of the school treasurer with their face value; that if it had not done so there would not have been sufficient money therein to honor the orders for school purposes from the respective school districts which they presented and which were paid by appellee; that if such overdrafts had existed the payments complained of would have been received as payments of such overdrafts. It denied the averments of knowledge by it as charged by the complaint, and averred that on the contrary it believed the distribution was proper and authorized by appellant. By way of special defense it averred the warrants were authorized by resolution of appellant, executed by Milliken as its secretary, delivered by him for appellant and sold to appellee for their full face amounts to be paid for by crediting the account of Milliken as treasurer; that such credits were the basis for the payment of numerous checks and orders drawn by him against his account as treasurer. It further denies knowledge of any check or order being for other than a legitimate purpose, and avers that the respective school districts have received the full benefit of the money represented by the warrants, and if appellee is required to repay the amount, the trustees will receive double payment to that extent; that the school treasurer in selling the warrants and in directing the tax money to be distributed as he did, was acting as secretary of appellant pursuant to their plan of operation, so that all his acts in regard to the warrants and payments were the acts of appellant for which it should not now equitably be permitted to complain; that if the moneys applied on the warrants had been deposited in the treasurer's account instead of having been distributed as directed, appellee would have had the right to apply

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Source: U.S. Census Bureau, *U.S. Census of Agriculture*, 1997, Table A-10.

1970-1971 1972-1973 1974-1975 1976-1977 1978-1979 1980-1981 1982-1983 1984-1985 1986-1987 1988-1989 1990-1991 1992-1993 1994-1995 1996-1997 1998-1999 2000-2001 2002-2003 2004-2005 2006-2007 2008-2009 2010-2011 2012-2013 2014-2015 2016-2017 2018-2019 2020-2021 2022-2023 2024-2025 2026-2027 2028-2029 2030-2031 2032-2033 2034-2035 2036-2037 2038-2039 2040-2041 2042-2043 2044-2045 2046-2047 2048-2049 2050-2051 2052-2053 2054-2055 2056-2057 2058-2059 2060-2061 2062-2063 2064-2065 2066-2067 2068-2069 2070-2071 2072-2073 2074-2075 2076-2077 2078-2079 2080-2081 2082-2083 2084-2085 2086-2087 2088-2089 2090-2091 2092-2093 2094-2095 2096-2097 2098-2099 2100-2101 2102-2103 2104-2105 2106-2107 2108-2109 2110-2111 2112-2113 2114-2115 2116-2117 2118-2119 2120-2121 2122-2123 2124-2125 2126-2127 2128-2129 2130-2131 2132-2133 2134-2135 2136-2137 2138-2139 2140-2141 2142-2143 2144-2145 2146-2147 2148-2149 2150-2151 2152-2153 2154-2155 2156-2157 2158-2159 2160-2161 2162-2163 2164-2165 2166-2167 2168-2169 2170-2171 2172-2173 2174-2175 2176-2177 2178-2179 2180-2181 2182-2183 2184-2185 2186-2187 2188-2189 2190-2191 2192-2193 2194-2195 2196-2197 2198-2199 2200-2201 2202-2203 2204-2205 2206-2207 2208-2209 2210-2211 2212-2213 2214-2215 2216-2217 2218-2219 2220-2221 2222-2223 2224-2225 2226-2227 2228-2229 2230-2231 2232-2233 2234-2235 2236-2237 2238-2239 2240-2241 2242-2243 2244-2245 2246-2247 2248-2249 2250-2251 2252-2253 2254-2255 2256-2257 2258-2259 2260-2261 2262-2263 2264-2265 2266-2267 2268-2269 2270-2271 2272-2273 2274-2275 2276-2277 2278-2279 2280-2281 2282-2283 2284-2285 2286-2287 2288-2289 2290-2291 2292-2293 2294-2295 2296-2297 2298-2299 2300-2301 2302-2303 2304-2305 2306-2307 2308-2309 2310-2311 2312-2313 2314-2315 2316-2317 2318-2319 2320-2321 2322-2323 2324-2325 2326-2327 2328-2329 2330-2331 2332-2333 2334-2335 2336-2337 2338-2339 2340-2341 2342-2343 2344-2345 2346-2347 2348-2349 2350-2351 2352-2353 2354-2355 2356-2357 2358-2359 2360-2361 2362-2363 2364-2365 2366-2367 2368-2369 2370-2371 2372-2373 2374-2375 2376-2377 2378-2379 2380-2381 2382-2383 2384-2385 2386-2387 2388-2389 2390-2391 2392-2393 2394-2395 2396-2397 2398-2399 2400-2401 2402-2403 2404-2405 2406-2407 2408-2409 2410-2411 2412-2413 2414-2415 2416-2417 2418-2419 2420-2421 2422-2423 2424-2425 2426-2427 2428-2429 2430-2431 2432-2433 2434-2435 2436-2437 2438-2439 2440-2441 2442-2443 2444-2445 2446-2447 2448-2449 2450-2451 2452-2453 2454-2455 2456-2457 2458-2459 2460-2461 2462-2463 2464-2465 2466-2467 2468-2469 2470-2471 2472-2473 2474-2475 2476-2477 2478-2479 2480-2481 2482-2483 2484-2485 2486-2487 2488-2489 2490-2491 2492-2493 2494-2495 2496-2497 2498-2499 2500-2501 2502-2503 2504-2505 2506-2507 2508-2509 2510-2511 2512-2513 2514-2515 2516-2517 2518-2519 2520-2521 2522-2523 2524-2525 2526-2527 2528-2529 2530-2531 2532-2533 2534-2535 2536-2537 2538-2539 2540-2541 2542-2543 2544-2545 2546-2547 2548-2549 2550-2551 2552-2553 2554-2555 2556-2557 2558-2559 2560-2561 2562-2563 2564-2565 2566-2567 2568-2569 2570-2571 2572-2573 2574-2575 2576-2577 2578-2579 2580-2581 2582-2583 2584-2585 2586-2587 2588-2589 2590-2591 2592-2593 2594-2595 2596-2597 2598-2599 2600-2601 2602-2603 2604-2605 2606-2607 2608-2609 2610-2611 2612-2613 2614-2615 2616-2617 2618-2619 2620-2621 2622-2623 2624-2625 2626-2627 2628-2629 2630-2631 2632-2633 2634-2635 2636-2637 2638-2639 2640-2641 2642-2643 2644-2645 2646-2647 2648-2649 2650-2651 2652-2653 2654-2655 2656-2657 2658-2659 2660-2661 2662-2663 2664-2665 2666-2667 2668-2669 2670-2671 2672-2673 2674-2675 2676-2677 2678-2679 2680-2681 2682-2683 2684-2685 2686-2687 2688-2689 2690-2691 2692-2693 2694-2695 2696-2697 2698-2699 2700-2701 2702-2703 2704-2705 2706-2707 2708-2709 2710-2711 2712-2713 2714-2715 2716-2717 2718-2719 2720-2721 2722-2723 2724-2725 2726-2727 2728-2729 2730-2731 2732-2733 2734-2735 2736-2737 2738-2739 2740-2741 2742-2743 2744-2745 2746-2747 2748-2749 2750-2751 2752-2753 2754-2755 2756-2757 2758-2759 2760-2761 2762-2763 2764-2765 2766-2767 2768-2769 2770-2771 2772-2773 2774-2775 2776-2777 2778-2779 2780-2781 2782-2783 2784-2785 2786-2787 2788

the funds upon any indebtedness of the treasurer, so that if the warrants were not valid, the amounts so credited to the treasurer's account could have been applied by appellee upon overdrafts which would have existed in the account if the warrants had not been credited thereto; that the credits may even now be cancelled if the warrants are invalid, leaving a large overdraft upon which the money may be applied the same as if properly in the account of the treasurer; that the payments complained of were all for the special purpose of being applied on the warrants and could not have been used by appellee for any other purpose, regardless of whether the warrants were held by appellee or some other person; that if Millikan had desired to take the cash for himself instead of applying it on the warrants he lawfully could have done so; that appellee was under contract with him as treasurer to honor his deposits as treasurer so long as it had no knowledge of any fraudulent misappropriation on his part; that appellant is seeking to hold appellee liable for its own action through its authorized representative; and that if the warrants are invalid, the payments upon them were made by mistake of law for which no recovery can be had.

The amended answer was not replied to, and the facts averred therein must be taken as confessed. The claim that the court erred in allowing it to be filed is without merit. By section 46 of the Civil Practice Act (Ill. Rev. Stat. 1941, Chap. 110, par. 170) amendments may be allowed at any time before final judgment adding new defenses, or to conform the pleadings to the proof. The amended answer in this case accomplished both purposes, and was properly allowed to be filed. No testimony was heard after it was filed.

Appellant invokes section 7 of the Act on Fiduciary Obligations (Ill. Rev. Stat. 1941, Chap. 98, par. 240) which provides: "If a deposit is made in a bank to the credit of a fiduciary as such, the bank is authorized to pay the amount of the deposit or any part thereof upon the check

the fact that the... were not valid, the... have been applied... the... may even not be... directly... account of the... aspect... used by... were... to take... lawfully... treasurer... of any... to hold... tentative... were made... therein must... allowing it to... traction of... allowed at any... conform the... accomplished... many was... (11)... is made... lead to...

of the fiduciary, signed with the name in which such deposit is entered, without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing the check or with knowledge of such facts that its action in paying the check amounts to bad faith." By the answer it stands admitted that appellee had no such knowledge, and on the trial it offered proof of that fact, and that the purchase of the warrants and the extension of the credit were done under the belief the warrants were valid, based upon the opinion of a reputable attorney. Cases cited by appellant holding that a depository is liable for diverting funds of a fiduciary to pay his individual debt have no application here. The section is not only inapplicable to appellant's contentions, but by its terms operates to discharge appellee from liability for the money which was deposited and then checked back to appellee. As to the \$2000.61 applied on the warrants without being actually deposited, the treasurer's account would have been overdrawn by that amount, and we regard the mechanics of the payment as making no difference in the result.

In our opinion, the amended answer sets up a complete defense. By the statute, the school treasurer is the sole custodian of the school funds of his township, and he is an insurer thereof. In what manner he kept the funds was of no concern to appellant or anybody else so long as he accounted for them as properly and legitimately paid out. He could deposit them in a bank, keep them at home, or in any manner he saw fit. His account in appellee bank was a matter solely between him and appellee. If appellee chose to extend him credit as treasurer, the credit was to him as such, not to appellant or any of the school districts. In extending credit to him as treasurer upon invalid warrants, or without any warrants at all, the result would be the same in either case as between him and appellee. It would result in an overdraft in either case, a matter solely between him as treasurer and appellee. It stands admitted that the credit was extended





to the treasurer and the money used by him for the school districts upon legitimate withdrawals. As between the treasurer and the school districts this was the same as if he had advanced his own money. Appellee advanced the treasurer the amount of the warrants, which he left in the bank as a credit, and in turn he advanced it to the school districts through legitimate orders drawn upon him as such Treasurer. It cannot be doubted the treasurer had the right to reimburse himself, for by so doing he would merely use the money as a balancing item in his account with them for the moneys properly paid out for their purposes and upon their orders. This would account for all money received by him for the districts, which is all the law required him to do. Having already paid out the money for the districts, when the amount came into his hands from taxes, it belonged to him. In our opinion, the circumstances justify the application of the principle of subrogation. It is to be remembered that this is not a suit by appellee to recover upon the invalid warrants, but the defense is based upon a closed transaction where credit was advanced in good faith to a fiduciary who repaid the advances by funds rightfully belonging to him and not to appellant or the school districts. Neither appellant nor the school districts will lose any money by the transaction, and appellee will not be enriched thereby. On the other hand, if a judgment should be entered against appellee it will lose the amount and the school districts will receive an amount for which they gave no consideration.

Furthermore, by authorizing the issue of the warrants through their own clerk, and by the statutory duty of appellant to examine the books and accounts of the treasurer, showing the transactions involved, the trustees knew, or are charged with knowledge, that appellee, under their acts and direction, advanced credit to their treasurer, and paid out the full amount thereof upon withdrawals by the school directors. If the warrants were invalid, the fault for the whole situation is that

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CONFIDENTIAL

for the first time in the history of the world.

...and ... ..

NOTES

3. The following are the names of the persons who have been appointed to the various positions in the organization:

— 257 —

12. The above information is correct, and I certify that the above is true.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

of appellant, initiated and carried out bec use of its own acts. It would be unjust and unconscieble to allow it to recover in such a case. It is further to be observed that as far as the record discloses, the transactions occurred only through a mistake of law, under which appellant is not entitled to recover. (People v. Foster, 133 Ill. 496.)

The judgment of the circuit court is affirmed.

Judgment affirmed.

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Volume 312

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